Jus Post Bellum

Towards a Law of Transition
From Conflict to Peace

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Carsten Stahn / Jann K. Kleffner
Editors

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FOREWORD

Ever since Hugo Grotius'seminal work *De iure belli ac pacis* (1625), the main distinction in international law is between *ius pacis* and *ius in bello*. Throughout time many works have been written on the law in times of peace (including *ius ad bellum)* and the law in times of armed conflict. This book departs from these established categories and enters new and partly uncharted waters. It explores the present-day merits and foundations of an old, yet timely idea: the concept of *just post bellum*. This notion has an established background in just war doctrine. But it is has significant potential in its application to the situation following modern armed conflicts, irrespective whether of an interstate or intrastate nature.

This book marks the first work which treats the origins, contents and contemporary challenges of *jus post bellum*. It offers new analysis and fresh thinking on one of the greatest challenges of warfare and armed force: the management and restoration of peace after conflict.

Twentieth century warfare and modern interventions have shown that the use of armed force is all too often followed by chaos and legal uncertainty after conflict. International law is still struggling to find the proper legal and institutional responses to these challenges. Fundamental issues, such as the extraterritorial application of human rights obligations, the accountability of occupying powers and international organizations and approaches towards justice and reconciliation, are at the heart of contemporary debate. New concepts, such as the notion of responsibility to protect are gradually emerging. This book addresses these issues from a novel perspective. It identifies legal gaps and policy challenges and inquires to what extent they may be addressed under a common normative umbrella: *jus post bellum*.

The individual contributions in this book are based on presentations and papers delivered at a joint research seminar in Leiden in February 2007, which was organized by the Grotius Centre for International Legal Studies of the University of Leiden and the Amsterdam Center for International Law of the University of Amsterdam. The seminar was organized with support of the Hague Institute for the Internationalisation of Law and the Netherlands Ministry of Foreign Affairs.

The seminar, and this resulting publication, included international speakers and participants from the disciplines of philosophy, legal history, political science and international law.

Part one of the book examines the historical and conceptual foundations of *jus post bellum* from a theoretical perspective. The individual chapters provide valuable insights on the origin and content of *jus post bellum* and peacemaking. They reveal both the existing synergies as well as differences between just war theory and international law.

Part two bridges the gap between theory and practice. The opening contributions analyze the contemporary policy and legitimacy challenges arising in transitions from conflict to peace. The subsequent chapters provide a useful stocktaking and critical review of the law in selected areas such as the law of occupation, human rights law, responsibility of international organizations and transitional justice.

Most of the individual contributions do not attempt to provide conclusive answers. But they pose the right questions and offer guidance on shortcomings, directions and possible avenues of reform. In this way, they make an important contribution to scholarship. It is our hope that this book will encourage further research and cooperation in this area, which is still largely unexplored.

Amsterdam/Leiden, January 2008

Prof. André Nollkaemper
University of Amsterdam

Prof. Nico Schrijver
University of Leiden

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
All ER	All England Law Reports
AP	Additional Protocol
ASIL	American Society of International Law
BiH	Bosnia-Herzegovina
BYIL	British Yearbook of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CIVPOL	Civilian Police
CoE	Council of Europe
CPA	Coalition Provisional Authority
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment
CRC	Convention on the Rights of the Child
CTS	Commonwealth Treaty Series
DAC	Development Assistance Committee
DFID	Department for International Development
Duke J. Comp. & Int'l L	Duke Journal of Comparative and International Law
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETS	European Treaties Series
EWHC	England and Wales High Court
FCNM	Framework Convention for the Protection of National Minorities
GA Res. (United Nations)	General Assembly Resolutions
GDP	Gross domestic product
HRC	Human Rights Committee
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFI	International financial institution
IFOR	Implementation Force
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labor Organization
ILR	International Law Reports
IPTF	International Police Task Force
ILSA J Int'l & Comp. L.	International Law Students Association Journal of International and Comparative Law
IRA	Irish Republican Army
IRRC	International Review of the Red Cross
J. Conflict & Security L.	Journal of Conflict and Security Law
KFOR	Kosovo Force
LJIL	Leiden Journal of International Law
LN Off. J.	League of Nations Official Journal
MoU	Memorandum of understanding
MSU	Multinational Specialised Unit
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organization
NILR	Netherlands International Law Review
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OHR	Office of the High Representative
ONUC	United Nations Operation in the Congo
OSCE	Organisation for Security and Cooperation in Europe
RIAA	Reports of International Arbitral Awards
RS	Republika Srpska
SC Res.	Security Council Resolution
SFOR	Stabilisation Force in Bosnia and Herzegovina

SIPRI	Stockholm International Peace Research Institute
SOFA/SOMA	Status of Forces/Mission Agreements
SRSG	Special Representative of the Secretary-General
SSR	Security Sector Reform
TAL	Transitional Administrative Law
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNDP	United Nations Development Programme
UN-DPKO	United Nations Department of Peacekeeping Operations
UNEF	United Nations Emergency Force (in the Sinai)
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNGA	United Nations General Assembly
UNICEF	United Nations (International) Children's (Emergency) Fund
UN GAOR	United Nations General Assembly Official Records
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNOSOM	United Nations Missions in Somalia
UNTS	United Nations Treaty Series
UST	United States Treaties
VAT	Value added tax
WW	World War
YIHL	Yearbook of International Humanitarian Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Introduction
FROM HERE TO THERE... AND THE LAW IN THE MIDDLE

Jann K. Kleffner*

The question how to move from armed conflict to a durable peace, be it between or within states, features prominently amongst the most fundamental issues that have confronted the international community in the past and continues to do so today. Only a random look at the daily news readily demonstrates the contemporary pertinence of that question as much as such a look is symptomatic of the absence of a 'one size fits all' recipe for peace. At the time of writing, the populations of Iraq and Afghanistan continue to struggle with the consequences of foreign intervention, followed and preceded by internal armed conflicts. At the same time, Uganda is making an attempt at ending a long and drawn out armed conflict with the Lord's Resistance Army. Colombia, embroiled in a non-international armed conflict for more than 40 years, has thus far remained unsuccessful in its various endeavours to putting an end to organized armed violence, inspired by an explosive yet resilient mix of narco-trafficking and other forms of organized crime and political motives. And in Nepal, a fragile peace between the Maoist insurgents and the government is far from consolidated, while in Kosovo, it remains unclear how a situation, which evolved from a period of repression and insurrection, to an armed conflict and foreign 'humanitarian' intervention to transitional administration by the United Nations, will eventually be resolved so as to ensure human security and stability in the region.

The structures of these randomly picked conflicts, the parties and their political, economic and other agendas differ considerably. Yet, one question binds all of them together: how to move from conflict to peace? A first preliminary factor in that equation is to conceptualize the 'here' and the 'there' and clarify at least a basic understanding of what is meant with 'conflict' and 'peace'. Neither the former nor the latter are static 'situations'. Rather, they are dynamic processes, which makes it difficult not only to pinpoint precisely when a transition from conflict to peace is taking place, but, more fundamentally, also bears the risk of misconceiving both ends and means. But even if one were to succeed in achieving a basic consensus on what 'peace' signifies, the way(s) to achieve it are far from obvious. States and their

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societies embroiled in conflict within or with other states, as well as other actors, have sought to get 'there' in various ways, with varying degrees of success. Transitional processes range from those in which outside actors are kept at a distance to those where the international community takes pride of place, for instance by establishing transitional administrations, which substitute the powers of the state and population concerned for their own.

With these observations in mind, the question looms large whether and to what extent international law has a role to play in periods of transition from armed conflict to peace. One possible view would be to assert that the idiosyncrasies of each armed conflict defy international legal regulation of the post-conflict phase. And yet, the reality is that international law concerns itself with such transitions in a variety of ways. Indeed, in the post WW II-era, with the United Nations Charter as its centre piece, international law has been intended to ensure a transition from the scourge of the two World Wars to a situation in which international peace and security is being maintained and, in the words of Charter's Preamble, states would 'practice tolerance and live together in peace with one another as good neighbours'. In that sense, the Charter is at least to some extent predicated on being part of post-conflict law, or *jus post bellum,* a third branch of law next to the two bodies of *jus ad bellum* and *jus in bello*; and a branch of law that does neither fit neatly into the 'law of war' nor into the 'law of peace', as it supplies norms and principles applicable in the aftermath of armed conflict in periods of transition from conflict to peace, with a view to regulate how one gets from 'here' to 'there'.

Practice has evolved considerably over the years since the adoption of the UN Charter. While some of the envisaged tools for the maintenance or restoration of international peace and security have remained a dead letter (such as standing UN-forces under Chapter VII of the Charter) the UN, regional organizations and individual (groups of) states have developed new mechanisms, which are designed to facilitate transitions from conflict to peace. As a central feature of such mechanisms, the increasing multi-dimensionality of peace-keeping operations is both cause and consequence of an understanding that 'peace' is more than the absence of war. This changing conceptualization of the 'there' has brought about new dimensions of the post-conflict phase and its regulation. In order to move towards 'positive peace', much more is required than 'just' ending organized armed violence. What is more, the idea has gained ground in recent years

> 'that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.'[1]

That responsibility of the international community, it is further asserted, does not end with prevention of and protection from violence. Rather, it also includes to

[1] See Report of the High-level Panel on Threats, Challenges and Change*, A more secure world: our shared responsibility*, 2 December 2004, paras. 201-203.

rebuild shattered societies,[2] to which the establishment of the Peacebuilding Commission bears witness, with its mandate to advise and propose integrated strategies for post-conflict recovery.

What, then, are the challenges – conceptual, theoretical and practical – posed by these developments to the fabric of international law? How is international law responding to these challenges? And how should it respond? What inspiration, if any, can one find in earlier approaches to the international legal regulation of the post-conflict phase? How can one embed the analysis of a *jus post bellum* into a broader scholarly agenda, which takes due account of other relevant (legal or other) disciplines? These questions are addressed in the various contributions to the current book.

The first Part of the book addresses a number of foundational issues that arise in the context of *jus post bellum*. In Chapter 1, Serena K. Sharma revisits the distinction between the *jus ad bellum* and *jus in bello*. She explains how that distinction has become a central feature of just war thinking and juxtaposes it with earlier ways of conceptualizing the relationship between the two. She then proceeds to point out the problematic consequences of maintaining a strict separation between the *jus ad bellum* and the *jus in bello* and its consequences for a possible third category of *jus post bellum*. In the second Chapter, Brian Orend develops a just war theory on *jus post bellum.* He argues that post war justice can and must be a concern for international legal regulation. Explaining the traditional ignorance or even rejection of a *jus post bellum* within just war theory, Brian Orend argues that this ignorance and rejection must be overcome, before offering a number of principles that, according to him, should govern *jus post bellum* and forcible post-war regime change. He concludes by addressing several challenges, seeking to dissolve doubts and strengthen resolve towards developing a *jus post bellum*. In Chapter 3, David Rodin identifies and discusses two specific issues of crucial importance to the development of *jus post bellum*. First, the need for a better developed account of the moral and legal considerations governing the termination of war, arguing that there are reasons to consider these issues as a fully independent component of just war theory. Secondly, he addresses the liability to trial and punishment after the war for the ad bellum crime of aggression. Challenging one of the fundamental legal assumptions that the crime of aggression is a 'leadership-crime' reserved for only the most senior governmental and military officials, David Rodin submits that there are strong reasons to extend such liability to ordinary line soldiers. Chapter 4 by Stephen C. Neff examines the historical and conceptual origins of the notion of *jus post bellum*, drawing on the regulation of conflict termination and peacemaking throughout different periods. He distinguishes a modern notion of *jus post bellum* from the medieval *jus victoriae* and argues that a *jus post bellum* is implicit in the very structure and nature of the post-1945 international legal order. Chapter 4 provides also some direction on the future development of *jus post bellum* in international law. Carsten Stahn subsequently clarifies the contemporary relevance and

[2] Ibid, para. 201.

meaning of *jus post bellum* as a legal concept in Chapter 5. He addresses how the discrepancy between just war theory and the theorization of the law of armed force emerged and explains why the absence of *jus post bellum* was not perceived as a gap in the structure of international law. He also offers some observations as to what extent it is necessary to re-think some of these categorizations today. Carsten Stahn identifies three areas which require further clarification, if the concept *jus post bellum* is developed from a theoretical principle into a normative framework for the organization of transition from conflict to peace: the nature of the concept, its substantive content and its operation.

Part II of the book then turns to the contemporary challenges of a *jus post bellum*. In Chapter 6, Michael Pugh makes a case for entrenching discussions about a *jus post bellum* into the wider debates in international politics about the purpose and role of peacebuilding according to norms of the liberal peace. He identifies three challenges in that regard: sovereignty, the rule of law and distributive justice. Annika Hansen and Sharon Wiharta subsequently address the question of how to bring about and consolidate rule of law reform that is suitable to and sustainable by a given society in Chapter 7. They submit that, while a *jus post bellum* will have to be flexible enough to take local preferences and sensibilities into account, it will likely be faced with the dilemma that international normative requirements of rights and values may at times differ from local preferences. In assessing the question, the authors differentiate between different groups of local actors and identify a number of obstacles that hamper the implementation of local ownership. From their analysis, they draw some implications of (obstacles to) local ownership for the viability and practicality of a *jus post bellum.* In Chapter 8, Charles Garraway offers a practioner's view on *jus post bellum.* He identifies four areas in which normative uncertainty results in practical problems in a post-conflict situation: occupation, the legal standards governing the use of force, detention and criminal justice. He argues that, as a practical matter, a coherent legal framework covering violence at all levels is needed. In Chapter 9, Ralph Wilde discusses whether human rights are part of *jus post bellum* and whether they should be. After highlighting some of the key issues that need to be addressed in establishing the human rights component, if any, of a *jus post bellum,* he poses the normative question of whether international human rights law should apply as part of this legal regime. Matteo Tondini, in Chapter 10 of the book, examines the accountability of international organizations for human rights violations. Since international organizations are among the principal actors in peace-building, he argues, *jus post bellum* will also have to deal with acts of international institutions. In examining this dimension of the normative framework for peacemaking, he contends that suing member states for acts of international organizations may represent an option to overcome the current obstacles in holding international organizations accountable for human rights violations. Chapter 11, by Mark Freeman and Dražan Djukić, analyze the possible ties between the concepts of transitional justice and *jus post bellum*. After introducing the concept of transitional justice, the authors inquire into the position of transitional justice within

the current law of armed conflict. They subsequently conceptualize the relationship between transitional justice and the emerging concept of *jus post bellum*.

Finally, Carsten Stahn offers some concluding observations on the future of *jus post bellum* in Part III of the book.

Part I
FOUNDATIONS OF A JUS POST BELLUM

Chapter 1
RECONSIDERING THE JUS AD BELLUM / JUS IN BELLO DISTINCTION

Serena K. Sharma*

> '*The ad bellum and the in bello parts are not deduced one from the other. How the two parts have related and how they should relate continue to be problems*.'[1]

Abstract
The practice of distinguishing between the jus ad bellum and jus in bello has become a paradigmatic feature of contemporary just war thinking. Although this approach to the ad bellum and in bello has, by and large, continued unquestioned, this was not the original way of conceptualizing the relationship between the two. Among the classical architects of the just war tradition no recognizable distinction was drawn between the jus ad bellum and jus in bello; conduct in war was directly tied to the purpose of war, such that the jus in bello formed an integral part of the ad bellum calculus. In light of recent attempts to incorporate a third just war category, the jus post bellum, into the just war framework, the relationship between the jus ad bellum and jus in bello calls for greater scrutiny. As this chapter will argue, the ad bellum/in bello distinction has become too easily assumed in just war writings, often to the detriment of the moral appraisal of war.

Introduction

Just war scholars tend to disagree with one another over many issues in their field, yet there is one aspect of the tradition, which remains largely undisputed: the practice of distinguishing between the *jus ad bellum* and the *jus in bello*. The *ad bellum/in bello* distinction has become an essential feature in modern articulations of the just war tradition. The centrality of the *ad bellum/in bello* distinction can be observed in the writings of Michael Walzer, arguably the most influential just war scholar of the past century.

> 'The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with refer-

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[1] W.L. La Croix, *War and International Ethics: Tradition and Today* (London, University Press of America 1988) p. 69.

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> ence to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that the war is being fought justly or unjustly…. The two sorts of judgements are *logically independent*.'[2] [emphasis added]

So crucial is the distinction between *ad bellum* and *in bello* in Walzer's thought that his reflections on war are framed within the context of this distinction:

> 'It is my purpose to see war whole, but since its dualism is the essential feature of its wholeness, I must begin by accounting for the parts…. Only then will it be possible to confront the tension between the ends and means, *jus ad bellum* and *jus in bello.*'[3]

It is this apparent tension between the *jus ad bellum* and *jus in bello*, which permits Walzer to make a clear separation between the two. By and large, just war scholars have endorsed Walzer's account of the *ad bellum/in bello* relationship.

The insistence of just war scholars on maintaining a sharp distinction between the *ad bellum* and *in bello* is, to a certain extent, puzzling when we recall its deviation from classical just war thinking. The medieval architects of the tradition recognized no such distinction between *ad bellum* and *in bello*; instead, matters of conduct formed an integral part of the *ad bellum* calculus. The reasons commonly articulated for maintaining a distinction between *ad bellum* and *in bello* are twofold. The first pertains to the issue of criminal responsibility: 'Those in political office are responsible for crimes of war (*jus ad bellum*), while military personnel are responsible for crimes in war (*jus in bello*).' Consequently, the logic of maintaining a separation between the two is a matter of legal pragmatism.[4] A second, and more pertinent reason from an ethics of war perspective, views the independence of the *jus in bello* as crucial for restraining the conduct of war. As Judith Lichtenberg explains:

> **'**If unjust combatants inevitably do wrong – do wrong simply by fighting at all – then once having taken up arms, they have no incentive to fight with restraint … maintaining the distinction between *jus ad bellum* and *jus in bello* provides an incentive.'[5]

Although both reason for maintaining the distinction appear logical, the *ad bellum/in bello* distinction has become too easily assumed in just war writings, and often to the detriment of moral reflections on war. In light of recent debates concerning the contemporary relevance of the just war tradition, the relationship between the *jus*

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[2] M. Walzer, *Just and Unjust Wars,* 3rd edn. (New York, Basic Books 2000) pp. 21-22.

[3] Ibid.

[4] P. Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Englewood, Cliffs, NJ Prentice Hall 1994) p. 98.

[5] J. Lichtenberg, 'Some Central Problems in Just War theory', in R.J. Hoffman (ed.), *The Just War and Jihad: Violence in Judaism, Christianity, and Islam* (Amherst, Prometheus Books 2006) p. 28-29.

ad bellum and *jus in bello* demands greater scrutiny. With that in mind this chapter will examine the extent to which the *ad bellum/in bello* distinction actually serves to enhance just war deliberations. However, preceding this, it is necessary to first establish how the distinction emerged in just war thought; accordingly, the essay is divided into two parts: Part one traces the evolution of the *ad bellum/in bello* distinction, while Part two critically assesses the impact of this distinction on contemporary just war debates.

1. Evolution of the Jus Ad Bellum/Jus In Bello Distinction

The first part of this chapter traces the evolution of a *jus ad bellum/jus in bello* distinction in just war thought.[6] Four time-periods will be considered below, each of which marks a particular phase in the development of the *ad bellum/in bello* distinction: Early Christian Just War Writings, where no discernable distinction is present; The Medieval Scholastics, marking the transitional phase; *Bellum Justum* to *Bellum Legale*, the point at which a distinction was explicitly drawn; and finally: The Revival Period, wherein the distinction is reaffirmed.

1.1 **Early Christian Just War theory**

Among the earliest just war thinkers the relationship between *jus ad bellum* and *jus in bello* was conceived of in a remarkably different manner. This is certainly the case with St. Augustine, typically regarded as the first major just war thinker.[7] In Augustine's thought there is no discernable distinction made between the *jus ad bellum* and *jus in bello.* With respect to the substance of each, most modern commentators tend to agree that the latter was the lesser developed of the two in Augustine's writings. On the whole, this reading of Augustine is accurate. Augustine's principal task, particularly in the *City of God,* was to reconcile the Christian vocation with the goods of the temporal sphere; thus, to provide a justification for Christian participation in warfare. This mandate led Augustine to focus on the *ad bellum* principles of proper authority and just cause. In terms of proper authority, Augustine argued: 'The natural order, which is suited to the peace of mortal things, requires that the authority and deliberation for undertaking war be under the control of a leader….'[8] Prospective 'just causes' for warfare included: the avenging of injuries, punishing wrongs, and returning what was wrongfully taken.[9]

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[6] For a more detailed examination of the development of just war tradition, see J.T. Johnson, J*ust War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, Princeton University Press 1981); *Ideology, Reason and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton, Princeton University Press 1975).

[7] This statement is something of an exaggeration. Important precursors to Augustine were Clement of Alexandria, Ambrose, and Cicero.

[8] St. Augustine, *Against Faustus the Manichean*, Bk. XXII Ch. 74-5, in E.L. Fortin and D. Kries (eds.), *Augustine: Political Writings,* trans. M.W. Tkacz and D. Kries (Indianapolis, Hackett 1994) p. 222.

[9] St. Augustine, Questions on the Heptateuch, bk. VI, ch. 10, in Louis J. Swift ed. and trans., *The Early Fathers on War and Military Service* (Wilmington, Michael Glazer 1983) p. 138.

Given Augustine's emphasis on these *ad bellum* issues, several commentators have found his treatment of the *jus in bello* profoundly lacking.[10] Yet, to suggest that restraint was altogether neglected in Augustine's thought is simply untrue. Within Augustine's writings a concern for restraint is evident in two important respects. The first resides in the end for which a war may be fought:

> 'Peace is not sought in order to provoke war, but war is waged in order to attain peace. Be a peacemaker, then, even by fighting, so that through your victory you might bring those whom you defeat to the advantages of peace.'[11]

The second comes across in Augustine's discussion of the appropriate disposition for a solider:

> 'The desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating … these are what are justly blamed in wars.'[12]

Hence, warfare, in and of itself was not evil; instead, the spirit of vengeance in the context of war was deemed the true evil. The implications for conduct are clear: unrestrained behavior would reveal a malevolent disposition – an outcome to be steadfastly avoided by the Christian soldier.

The Augustinian emphasis on appropriate inward disposition was further developed at the hands of Thomas Aquinas into the principle of right intention. Interestingly, in Aquinas' treatment there was a certain priority granted to the principle of right intention in relation to other just war principles. Hence, even in such cases where the fulfillment of all other just war criteria had been satisfied, the absence of right intention could render the entire war unjust: 'For it can happen that even if war is declared by a legitimate authority and for a just cause, that war may be rendered unlawful by a wicked intent.'[13] This priority conferred upon right intention relative to other just war principles remained in tact throughout the middle ages.

The classical approach to the *ad bellum/in bello* relationship diverges significantly from the contemporary model. While it has become commonplace to

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[10] Ramsey who purports to find in Augustine's writing the 'genesis of non-combatant immunity' is of course the exception. P. Ramsey, *War and the Christian Conscience: How Shall Modern War be Conducted Justly* (Durham, Duke University Press 1961). Ramsey's contention has been widely debated. See in particular, W. O'Brien, 'The International Law of War as Related to the Western Just War Tradition', in J. Kelsay and J.T Johnson (eds.), *Just War and* Jihad*: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York, Greenwood Press 1991) p. 165; and R.S. Hartigan, *The Forgotten Victim: a History of the Civilian*, (Chicago, Precedent Pub 1982) p. 203.

[11] St. Augustine, Letter 189, to Boniface, in Fortin and Kries *supra* n. 8, p. 220.

[12] St. Augustine, *Against Faustus the Manichean*, *supra* n. 8, pp. 221-222.

[13] Thomas Aquinas, 'Summa Theologiae IIaIIae 40: On War, Articulus 1: Whether it is Always a Sin to Wage War?', in R.W. Dyson (ed.), *St Thomas Aquinas Political Writings* (Cambridge, Cambridge University Press 2002) p. 241.

treat the *ad bellum* and *in bello* as logically separate, self-contained categories, the main interests of early just war thinkers tend to cut across these supposedly distinct categories. Given this overlap, there was no perceived need to develop an autonomous *jus in bello* among the progenitors of just war thought, as Ian Clark argues.

> 'Since war was a limited activity, and since what was justified was only that which was strictly necessary to its purpose, there was no felt need to proceed to elaborate a separate set of principles for its conduct … what could be legitimately done in war derived from the purpose of war itself and, provided war was entered into with this right intention of restoring a just peace, the conduct of war would properly take care of itself.'[14]

1.2 The medieval scholastics

Among medieval just war thinkers warfare continued to serve a punitive function wherein 'a belligerent party was empowered to enforce its rightful claim or to sanction an injury caused it by the other party.'[15] This constitutes a further reason why there was no perceived need to invest in the development of an autonomous *jus in bello*. In accordance with the punitive approach to war:

> 'the legal effects … were strictly conditioned by the underlying cause and therefore could only benefit the righteous belligerent … the unrighteous adversary was not even deemed a belligerent; he was merely the rebellious object of armed coercion.'[16]

So long as this punitive model remained in tact there was little incentive to establish a system of rights which would apply equally to the conduct of all parties. It was only with the conscious move away from the punitive model that a new conception of *ad bellum* and *in bello* became a possibility.

In the 16th century, just war thought began this transition from the punitive model at the hands of several eminent Scholastics of the Salamanca School. The most notable was Francisco de Vitoria, who drew upon natural law in his application of just war concepts to the most pressing issue of his day: Spain's conquest of the Americas. Vitoria's method constituted 'the first serious attempt to apply natural law theory across cultural and religious boundaries.'[17] This is but one way in which Vitoria paved the way for a non-punitive approach to just war. A further development initiated by Vitoria was a reworking of the principle of just cause: 'the sole and only just cause for waging war is when harm has been inflicted.'[18] Vitoria's

[14] I. Clark, *Waging War: A Philosophical Introduction* (Oxford, Clarendon Press 1990) p. 38.

[15] G.M. Reichberg, H. Syse and E. Begby (eds.), *The Ethics of War: Classic and Contemporary Readings* (Malden, Blackwell Publishing 2006) p. 227.

[16] Ibid.

[17] La Croix, *supra* n. 1, p. 78.

[18] F. Vitoria, *On the Law of War,* Question 1(3): What are the Permissible Reasons and Causes of Just War?, in A. Pagden and J. Lawrence (eds.), *Vitoria: Political Writings* (Cambridge, Cambridge University Press 1991) p. 303.

approach to just war was reminiscent of the Roman tradition, wherein 'justice was "objectively" satisfied by method … rather than by a subjective judgment.'[19] Another affiliate of the Salamanca School, who emphasized objective reasons for war based solely on 'material injury', was Vitoria's successor Luis de Molina:[20] 'Notice, however, that it is sometimes sufficient for a just war that there be injury [committed] materially (*injuria materialiter*), which involves no sin.'[21]

The emphasis on objective, material reasons for war advocated by Vitoria and his successors was momentous in terms of its implications for the *ad bellum/in bello* relationship. Whereas under the punitive model only one side could logically be deemed 'just', the approach of the Spanish Scholastics raised the prospect of justice residing on both sides:

> '… where there is provable ignorance either of fact or of law, the war may be just itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are hence excused from sin. Invincible error is a valid excuse in every case.'[22]

The prospect of simultaneous justice refutes the presence of subjective moral guilt on the part of the enemy. As one might expect, the absence of subjective moral guilt on the enemy's behalf carried positive implications in terms of restraint, as Molina argued:

> '… since there is no guilt on the part of the enemy, it is only permitted to use against them the force necessary to wrest from their power what they have unjustly withheld materially … this should be carried out with the least possible damage to them.'[23]

Aside from the enhanced prospects for restraint, the actual substance of the *jus in bello* was also significantly altered by the Scholastics. As we have seen, the emphasis on subjective intention played a crucial role in limiting the conduct of war throughout the medieval period. An important conceptual shift was introduced in the writings of Franscisco Suarez, who replaced the principle of right intention – the most subjective of all just war criteria – with the more objective notion of *debitus modus*: the right manner in waging war.[24] A consequence of this shift toward *debitus modus* is that *jus in bello* restraint would no longer be subsumed under *ad bellum* consider-

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[19] Christopher, *supra* n. 4, p 61.

[20] The approach towards defining just cause in terms of an objective, material injury followed closely in the footsteps of another eminent Spaniard: Isidore of Seville; whose approach to just war in the 6th century was quite ahead of its time.

[21] L. Molina, '*On Justice and Law*, tract II disputation 102: A Common Just Cause for War, Comprising all of the Others', in Reichberg et al., *supra* n. 15, p. 334.

[22] F. Vitoria, *On the Law of War,* Question 2 (4): War Cannot be Just on Both Sides, in Pagden and Lawrence (eds.), *supra* n. 18, p. 313.

[23] L. Molina, '*On Justice and Law*', in Reichberg et al., *supra* n. 15, p. 337.

[24] F. Suarez, 'From Disputations XIII: On War, section VII: What is the Proper Mode (Debitus Modus) of Conducting War?', in Reichberg et al., *supra* n. 15, p. 360.

ations; the stage was set for the independent development of *jus in bello* restraint.

Notwithstanding these developments, there were still considerable remnants of the punitive model embedded in the writings of Vitoria and his successors. For instance, although the Spanish scholastics allowed for the prospect of simultaneous just cause, this could only be in cases of 'invincible ignorance'; as far as actual justice was concerned, only one side could be truly just. Other just war thinkers at the time, such as Alberto Gentili, were prepared to go further by enabling simultaneous justice not only subjectively, but also objectively. For that reason, the medieval scholastics constitute a transitional phase in the move away from the punitive model.

1.3 **Bellum Justum to Bellum Legale**

The shift from subjective restraint to objective restraint (*debitus modus)* necessitated a proper delineation of rules pertaining to conduct. Indeed, the importance of restraint became gradually more pronounced for those engaged in just war discussions. Hugo Grotius is a case in point. Responding to Thirty Years War, Grotius expounded his rationale for taking up the subject of war in the Prolegomena of *De Jure Belli*:

> 'I have had many and weighty reason for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of … and that when arms have once been taken up there is no longer any respect for law….'[25]

Already the contrast with classical just war writers is evident. Grotius' impetus for writing, a perceived lack of restraint in warfare, marks a sharp contrast with Augustine, for whom the preliminary issue was justifying Christian participation in warfare.

The advent of the state system, officially coinciding with the Peace of Westphalia in 1648, heightened the impetus for the establishment of a body of law to guide inter-state conduct. From this point on, just war ideas were developed within the bounds of a burgeoning international legal order. This marked a decisive shift in the tradition. Whereas the earliest just war thinkers had been theologians and philosophers, from the 18th century onwards the tradition came to be dominated by jurists. Christian Wolff, though not a jurist by training, was nonetheless interested in developing a body of law for inter-state relations, as he stated in his introduction to 'The Law of Nations'.

Though Wolff considered natural law the chief source of international law, he deemed the natural law which applied to states to be of a different character. Herein, Wolff makes a crucial distinction between the necessary law of nations and

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[25] H. Grotius, '*The Law of War and Peace*', Prolegomena in C. Brown, T. Nardin and N. Rengger (eds.), *International Relations in Political Thought:* Texts from the Ancient Greeks to the First World War (Cambridge, Cambridge University Press 2002) p. 331.

voluntary law of nations; a distinction which would have important consequences for the *ad bellum/in bello* relationship. The necessary law refers to nations in state of nature, while the voluntary law is dictated by the needs and rules of international society. With respect to the relation between the two, the voluntary law has a certain priority over the necessary law. This feature comes across in Wolff's discussion of war:

> 'although by natural law a war cannot be just on both sides, since nevertheless each of the belligerents claims that it has a just cause of war, each must be allowed to follow its own opinion. Consequently, by the voluntary law of nations the war must be considered as just on either side, not indeed in itself … but as regards the effects of the war (*effectus belli*).'[26]

Hence, according to the dictates of natural law, a war cannot be just on both sides; nevertheless, the voluntary law of nations compels it to be considered as such. The recognition of justice on both sides allows the *in bello* to stand independently of the causes of war. A similar approach is advanced by the 18th century jurist, Emerich de Vattel:

> 'The sovereign, therefore, whose arms are not sanctioned by justice, is not the less unjust or less guilty of violating the sacred law of nature, although that law itself … requires that he be allowed to enjoy the same external rights as justly belong to his enemy.'[27]

In both writers, the demands of natural law must yield to the dictates of the voluntary law. In this manner, the 18th century jurists institute a rather momentous change in just war thinking, that is, 'a clear separation of the conditions for a morally just war from those for a legally just war.'[28]

Wolff and Vattel were the last writers who drew upon natural law in their discussions on war. From the 19th century onwards there was a shift from natural law to positive law, the basis of which are customs and treaties. Under this new legal regime, 'The illegality of resort to war was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement.'[29] Accordingly, the whole notion of 'just wars' became rather antiquated; the point of interest was no longer deciphering just wars from unjust wars, but rather legal wars from illegal wars. The result was 'progressive slide away' from *ad bellum* justice, 'resulting in the abandonment of the search altogether'.[30] At this point in

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[26] C. Wolff, '*The Law of Nations Treated According to a Scientific Method,* 888. What War is to be Considered Just by the Voluntary Law of Nations', in Reichberg et al., *supra* n. 15, p. 474.

[27] E. Vattel, *The Law of Nations* Book 3, Ch. 12. Of the Voluntary Law of Nations, as it Regards the Effects of Regular Warfare, Independently of the Justice of the Cause (New York, AMS Press 1982) p. 383.

[28] R. Holmes, *On War and Morality* (Princeton, Princeton University Press 1989) p. 159.

[29] J.L. Kunz, '*Bellum justum* and Bellum Legale', 45 *AJIL* (1951), p. 532.

[30] Clark, *supra* n. 14, p. 41.

time, 'the concept of *bellum legale* replaced the concept of *bellum justum*',[31] the importance of which was the legal regulation of the effects of war.

1.4 The revival period

Viewed through the lens of the Enlightenment the prospect of restrictions on the use of force through customs and treaties was viewed as a progressive development, for it implied that even warfare could be kept under human control.[32] The exception was of course Immanuel Kant, who criticized international lawyers of his day for their efforts to regulate rather than abolish war.[33] The Perpetual Peace model advocated by Kant and his contemporaries profoundly influenced the shape of the *jus ad bellum* in the 20th century. In response to the perceived excesses of the *liberum jus ad bellum* attempts were made to limit the resort to war through the establishment of international institutions, which would serve to regulate the interstate use of force. The effort to proscribe war was manifest in the mandate of the League of Nations (1920) and the Kellog Briand Pact (1928). The WW II intensified the juristic momentum to abolish warfare, as is evident in Article 2(4) of the United Nations Charter, which restricts not only the use of force, but also the threat of force:

> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'[34]

The sole exceptions to this prohibition on the use of force include self-defense and enforcement action authorized by the UN Security Council. Together these developments reinforce a strong presumption against the use of force in the modern-day *jus ad bellum.*

The legal prohibition of war brought into question the relationship between the *jus ad bellum* and *jus in bello*. With the resort to force now deemed unlawful questions were raised as to what extent those responding to aggressive war were bound by the restrictions and obligations of international law; and likewise, whether aggressors could benefit from rights afforded by international law. In other words, the issue at stake was whether the *jus in bello* would still be applied equally to both sides, irrespective of the *jus ad bellum*. The matter was firmly resolved at the US Military Tribunal following WW II:

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[31] Kunz, *supra* n. 29, p. 532.

[32] Coinciding with these developments was the establishment of the International Committee of the Red Cross. From it's inception in 1863, the ICRC has been a testament to the notion of equality among belligerents, as G. Best has argued: 'The Red Cross has always administered relief to sufferers in wartime without regard to the quality of the causes for which they may have been fighting; for the excellent and explicit reason, that human suffering is human suffering, whether incurred in the course of a "just war" or not.' *Humanity in Warfare* (London, Weidenfeld and Nicolson, 1980) p. 4.

[33] See I. Kant, *Perpetual Peace: a Philosophical Proposal*, trans. by H. O'Brien (London 1927).

[34] Charter of the United Nations, Ch. 2(4) <www.un.org/aboutun/charter/>.

> 'international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.'[35]

While a number of challenges have been raised against the *ad bellum/in bello* distinction subsequent to Nuremberg, the distinction was eventually reaffirmed in the1977 Additional Protocol to the Geneva Conventions.[36] Today the principle of distinction enjoys the utmost legal support. It has been expressly stated in a number of significant legal cases;[37] reiterated in several internationally binding conventions[38] and backed by virtually every international lawyer of the modern period.[39] From a legal standpoint, the notion of a distinction between *ad bellum* and *in bello,* has become, in the words of Louis Doswald-Beck 'absolute dogma'.[40]

Overlapping with these legal developments the 20th century witnessed a veritable rebirth in just war thinking, in large part owing to the two World Wars. Although the distinction between the *ad bellum* and *in bello* was not a recognizable feature of early just war discussions, the literature at the forefront of the just war revival period took its cue from international law by categorically accepting the *ad bellum/in bello* distinction. What is more, within the revival literature there was an acceptance of certain underlying assumptions accompanying the *ad bellum/in bello* distinction – some of which have persisted in recent just war scholarship – such as: (i) a strong presumption against war in general, leading to the utilization of just war criteria in an effort to overcome this presumption;[41] (ii) a foregrounding of the state, which tolerates the use of force solely in the two cases stipulated by the UN

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[35] See *USA* v. *List* et al., (1948), 11 N.M.T. 1230, 1247.

[36] Protocol Additional to the Geneva Conventions of 12 August 1949 (Preamble) A. Roberts and R. Guelph (eds.), *Documents on the Laws of War* (Oxford, Oxford University Press 1999) pp. 422-423.

[37] See Y. Dinstein, *War and Aggression and Self-Defence*, 3rd edn. (Cambridge, Cambridge University Press 2002) pp. 143-145.

[38] The distinction between *jus ad bellum* and *jus in bello* has been confirmed by Common Art. 1 of the Geneva Conventions, ICRC Commentary on the Conventions, the Diplomatic Conference on the Reaffirmation and Development of IHL, and Protocol I. This vast support 'confirms the autonomy of humanitarian law in relation to jus ad bellum', cited in F. Bugnion, 'Just Wars, Wars of Aggression and International Humanitarian Law', 84 *IRRC* (2002), pp. 523 at 22.

[39] Dinstein, *supra* n. 37, pp. 140-147; C. Greenwood, 'The Relationship between *jus ad bellum* and *jus in bello*', 9 *Review of International Studies* (1983), pp. 221-234.

[40] L. Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', *IRRC* No. 316, 28 February 1997 <www.icrc.org/Web/Eng/siteeng0.nsf/html/57JNFM>.

[41] This approach uses just war criteria as a way to overcome the supposed presumption against war. National Conference of Catholic Bishops, The Challenge of Peace: God's Promise and Our Response, A Pastoral Letter on War and Peace (Washington, Office of Publishing Services, United States Catholic Conference 1983); J. Childress, *Moral Responsibility in Conflicts: Essays on Non-violence, War, and Conscience* (Baton Rouge, Louisiana State University Press 1982); R. Potter, Jr., 'The Moral Logic of war', 23 *McCormick Quarterly* (1970) pp. 203-233; for a rebuttal of this so-called 'presumption against war' see J. Stout, 'Justice and Resort to War: A Sampling of Christian Ethical Thinking', in J.T. Johnson and J. Kelsay (eds.), *Cross, Crescent and Sword: the Justification and Limitation of War in Western and Islamic tradition* (New York, Greenwood Press 1990).

Charter;[42] (iii) an almost exclusive interest in the *jus in bello*.[43] Hence, by the time of the 20th century revival period, the evolution of the *jus ad bellum*/*jus in bello* relationship had come full circle: from no discernable distinction between the *ad bellum* and *in bello* –and an apparent focus on the former – towards a complete detachment of the two, and a rather obvious focus on the latter.

2. The Ad Bellum/In Bello Distinction Reconsidered

The first part of this chapter accounted for the development of a distinction between the *jus ad bellum* and the *jus in bello* in just war thought. The next half will critically assess the impact of the *jus ad bellum*/*jus in bello* distinction on contemporary just war debates. Three specific objections to the distinction will be raised. (i) The distinction's inherently juristic orientation, which has come largely at the expense of moral considerations; (ii) The difficulties that arise in the application of just war criteria when matters of conduct are divorced from the resort to force; (iii) A final section will survey the extent to which the distinction enhances restraint in the conduct of war.

2.1 **The 'legalist paradigm'**

While the developments of the 20th century are often hailed as a triumph from the perspective of international law, something significant appears to have been sacrificed along the way. In the preamble to the UN Charter avoidance of war takes precedence over all other matters, as Josef Kunz argues:

> 'Two World Wars and the fear of more catastrophic wars have made the avoidance of war more important than the achievement of justice … [which is] not the philosophy underlying the *bellum justum* doctrine.'[44]

According to James Turner Johnson,

> 'What is lost here is the just war tradition's realistic focus on the possibility of genuine order, justice, and peace … and the tradition's effort to define the use of armed force in terms of the responsibility of the sovereign to protect the common good.'[45]

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[42] This is evident in Walzer's legalist paradigm. Despite the exceptions and alterations, there is still a strong statist presumption in his work, and an obvious adherence to the aggressor/defender model.

[43] This is particularly evident in the work of Ramsey. Ramsey drew a distinction between the role of the moralist and the role of the statesperson – putting *ad bellum* issues effectively in the hands of the latter – leaving the moralist to deliberate on the *jus in bello*. For Ramsey, the most important part of just war was the *jus in bello* principle of non-combatant immunity.

[44] Kunz, *supra* n. 29, pp. 533-534.

[45] J.T. Johnson, 'The Just War Idea: The State of the Question', 23 *Social Philosophy & Policy* (2006), pp. 167 at 171.

With this in mind, Johnson has been highly critical of modern writers who neglect to engage with the classical just war model;[46] nevertheless, in his own work Johnson adheres to a conceptualization of the *jus ad bellum* and *jus in bello* wholly sympathetic to modern understandings:

> 'In just war reasoning, the justice of the decision to resort to armed force is distinct from the justice of how justified armed force is used. A just war in the former sense may be unjustly carried out; conversely, a war undertaken unjustly may be carried out justly.'[47]

As we have seen, there is nothing reminiscent of the classical model in this approach. What Johnson neglects to appreciate is the way in which the *ad bellum/in bello* distinction reaffirms the biases of the contemporary international legal order. Indeed, the categorical acceptance of the *ad bellum/in bello* distinction – a purely legal innovation – has given contemporary deliberations on the use of force an undeniably juristic flavor.

The recent debate over the use of force in Iraq is a case in point, wherein the main point of contention, particularly in the United Kingdom, revolved around the subject of legality. Nicholas Rengger has commented on this phenomenon:

> 'what was perhaps oddest, at least to my eye, was that the general discussion both amongst politicians and in the media, and independently of what particular position was taken … was almost exclusively focused on whether or not the war was "legal".'

Further to this, Rengger has observed what was glaringly absent in the Iraq debate: 'At no point that I am aware of, did anyone seriously discuss the surely related question that even if it was legal, was it morally justified?'[48] The nature of the debate over Iraq is not an isolated incident, but rather characteristic of how the contemporary use of force is evaluated. The extent to which a legal framework tends to dominate the moral appraisal of war is captured by Walzer's treatment of the contemporary *jus ad bellum* under the banner of the aptly named: 'legalist paradigm'.

Relying predominately on the concept of legality to determine the merits of a prospective use of force is, however, rather limited. Nowhere is this more apparent than the pride of place endowed to the state in contemporary international law. The melding of the criterion of proper authority with the legal personality of the state was a logical step in the development of the *jus ad bellum*, and an important precursor to the establishment of an independent *jus in bello*. Nevertheless, in recent years this foregrounding of the state in contemporary *jus ad bellum* has come

[46] For instance, Johnson criticises Walzer and Ramsey for failing to consult the classical just war tradition in their writings.

[47] J.T. Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict* (Lanham, Rowman & Littlefield Publishers 2005) p. 102.

[48] N. Rengger, 'The Judgement of War', 31 *Review of International Studies* (2005), pp. 143 at 145.

under increased scrutiny. The state-centric approach constitutes a major defect in the current international legal structure, as George Lucas has argued:

> 'While it provides appropriate analysis and response to the behaviour of "rogue" or "criminal" states, the legalist model of international relations is largely ineffective in delineating appropriate response to "failed states", and utterly collapses in the case of "inept states".'[49]

By way of accepting the *ad bellum/in bello* distinction, and its implicitly juristic reading of these categories, just war thinking has been hard pressed to respond to some of the most pressing conflicts of the day.

The debates surrounding NATO's intervention in Kosovo offer a revealing demonstration of the juristic model's limitations. This was particularly evident in the report of the Independent International Commission on Kosovo which was forced to reach the conclusion that NATO's military intervention in Kosovo was

> '*illegal* but *legitimate* … illegal because it did not receive prior approval from the United Nations Security Council … [yet] …intervention was justified … because [it] had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.'[50]

As the Commission rightly noted, there were ethical reasons for intervening in Kosovo; however, given the absence of UN Security Council approval, NATO was exposed to the charge of illegality. With the Kosovo intervention in mind, Ken Booth has argued the following:

> 'The presumption should always be against war, both in general and in particular … War can be necessary or excusable; it is such when it is fought clearly in self-defense of with the endorsement of the UN Security Council. This is not perfect, but it is the best that can be done at this stage of world society.'[51]

Despite his admission that the current structure is 'not perfect', Booth continues to accept it. In this respect Booth offers little more than a restatement of the prevailing juristic model – a mere description of how things are. Clearly, such an approach is more interested in dealing with the legal consequences of war than bringing moral weight to bear on the use of force.

As the debate over NATO's intervention demonstrates, there are moral/ethical considerations, which must be brought to bear in any evaluation of the use

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[49] G.R. Lucas, Jr., 'From *Jus ad bellum* to Jus Ad Pacem: Re-thinking Just-War Criteria for the use of Military Force for Humanitarian Ends', in D. Chatterjee and D. Scheid (eds.), *Ethics and Foreign Intervention* (Cambridge, Cambridge University Press 2003) p. 80.

[50] Independent International Commission on Kosovo, *The Kosovo Report*: *Conflict, International Response, Lessons Learned* (Oxford, Oxford University Press 2000) p. 4.

[51] Ken Booth, 'Ten Flaws of Just War', in Ken Booth (ed.), *The Kosovo Tragedy: The Human Rights Dimensions* (London, Frank Cass 2001) p. 324.

of force; yet, this moral/ethical dimension is by no means sufficiently captured within the framework of contemporary international law. The precise relationship between the law of armed conflict and the just war tradition is, indeed, a complex one. Certainly there is a degree of overlap between the two, and one could make the case that the law of armed conflict is, in essence, a codification just war principles; yet, there are important variations between them, as Brian Orend has noted:

> '… most times just war theory and the laws of armed conflict run together and are mutually confirming … But other times they are not and I'm more concerned to defend and forward just war theory when that happens. Why? First, because just war theory explains its values whereas international law merely asserts them. Secondly, because international law (like all law) lags behind the times sometimes whereas our theories need not. Third, because international law is the product of state consensus, and sometimes consensus is wrong. Sometimes the laws of armed conflict enshrine bad law, or fail to include a good law. Just war theory, better than any other, helps guide international law towards correction in this regard.'[52]

As Orend makes clear, it is crucial that just war theory retain its independence in order to 'fill in the gaps' – so to speak – of international law. Through its uncritical acceptance of the *ad bellum/in bello* distinction, the just war tradition has been unable to function in this capacity. This becomes even more apparent when we examine the practical application of just war criteria within the context of a distinction.

2.2 Problems with application

Aside from the limitations wrought by the distinction's juristic orientation are a number of functional drawbacks that come to pass when matters of conduct are divorced from the resort to force. The claim that there are deficiencies with respect to the application of just war criteria is by no means a unique observation; yet, most conventional critiques fail to observe the connection between the *ad bellum/in bello* distinction and the problems that arise in the application of just war criteria. This section will examine three specific drawbacks associated with the *ad bellum/in bello* distinction.

2.2.1 *Jus ad Bellum versus Jus in Bello*

As we have seen, there was no discernable distinction made between the *jus ad bellum* and *jus in bello* among early just war thinkers. Rather, questions of limitation were instinctively part of the *ad bellum* calculus. Commenting on the classical just war model, Rengger makes a critical observation:

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[52] B. Orend, *The Morality of War* (Ontario, Broadview 2006), p. 37.

> 'The point of the classical just war thinkers' constant emphasis on the twin poles of authority and judgment is that we need to weigh judgements about threat, proportion and the like against one another.'[53]

The key word in Rengger's remark is the need to 'weigh', that is find a balance between the *ad bellum* and *in bello*. Given the pervasiveness of the *ad bellum/in bello* distinction, this emphasis on balance has been lost in most contemporary just war discussions. Instead, the conventional approach – set in the framework of the *ad bellum/in bello* distinction – is to view the resort to force and questions of conduct as operating in an adversarial relationship. When put into context it becomes an issue of *jus ad bellum* versus *jus in bello*, in which, one is promoted at the expense of the other.

More often than not, when it comes to the push and pull of *ad bellum* versus *in bello*, it is typically the *jus ad bellum* that is given priority, and the principle of just cause in particular. Modern just war discussions are littered with instances where just cause has been elevated above all other principles.[54] The adversarial aspect of the *ad bellum/in bello* distinction begins to manifest in cases where the principle of just cause takes over the entire deliberation, to the detriment of *jus in bello* restraint.[55] Placing just cause in a contest with *in bello* is precisely the type of calculation Walzer takes up in his discussion of supreme emergency, wherein he permits the war convention (*jus in bello*) to be overridden in cases of overwhelming necessity (*jus ad bellum*). The abandonment of restraint owing to just cause is particularly ironic given that one of the declared rationales for a distinction is the facilitation of proper conduct. Given such an obvious inconsistency, it is no wonder that the notion of supreme emergency has been so heavily criticized.[56] One of the sharpest criticisms has come from John Howard Yoder, who refers to this tendency of elevating certain just war principles at the expense of others as 'category slide'. As Yoder contends: 'It may be a weakness of the entire just-war tradition that it permits such a selective application.'[57]

The *jus ad bellum* versus *jus in bello* tendency can also apply in the reverse direction, wherein the *jus in bello* is emphasized in way that negates the *jus ad bellum*. Noting the prevalence of this approach during the Cold War, where it was

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[53] Rengger, *supra* n. 48, p. 155.

[54] R. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, Johns Hopkins Press 1960).

[55] Jeff McMahan's work is the exception here. He sees just causes as prior to all other just war principles but, is clear that just cause depends on the fulfilment of other just war principles; not at their expense. See J. McMahan, 'Just Cause for War', 19 *Ethics and International Affairs* (2005), pp. 1-21.

[56] See for instance: A. Bellamy, 'Supreme Emergencies and the Protection of Non-Combatants in War', 80 *International Affairs* (2004), pp. 829-850.; B. Orend, *Michael Walzer on War and Justice* (Cardiff, University of Wales Press 2000); T.J. Koontz, 'Noncombatant immunity in Michael Walzer's Just & Unjust Wars', 11 *Ethics and International Affairs* (1997), pp. 55-82; O'Brien, *supra* n. 10, p. 163-194; T. Nardin, *Law, Morality and the Relations of States* (Princeton, Princeton University Press 1983).

[57] J.H. Yoder, *When War is Unjust: Being Honest in Just-War Thinking* (Minneapolis, Augsburg Press 1984) p. 64.

argued that the indiscriminate and disproportionate nature of nuclear weapons instinctively ruled out any prospective use of force, Ramsey pejoratively labeled this tendency the '*jus contra bellum*'.[58] According to Ramsey, the *jus contra bellum* approach constitutes a *bellum contra bellum justum* – a war against just war – given its deliberate elevation of the *jus in bello* at the expense of the *jus ad bellum*. Elevating certain just war criteria in this manner is, however, a natural consequence of perceiving the *ad bellum* and *in bello* in a state of tension – a perception, which is no doubt fostered by the *ad bellum/in bello* distinction.[59]

2.2.2 *The* '*checklist approach*'

Apart from the tendency of elevating certain just war criteria at the expense of others, the *ad bellum/in bello* distinction has also manifested in another troubling tendency: the checklist approach. On account of the sharp distinction, which has been drawn between the *jus ad bellum* and *jus in bello*, the moral appraisal of war is typically regarded as encompassing two independent judgments. Accordingly, when just war principles are operationalized within the context of a distinction, the *ad bellum* and *in bello* are treated as subcategories, with all relevant just war criteria listed below each. Such a formulation lends itself to the impression that a check need be placed next to each criterion in order for a war to be deemed 'just'. Typically the *jus ad bellum* list will be as follows: just cause, proper authority, right intention, reasonable prospects, last resort, proportionality; the *jus in bello* will normally include the principles of discrimination and proportionality. While there are virtually uncountable ways to present the lists,[60] the central idea is the same in terms of the requirement that all criteria be satisfied. Hence, whereas the *ad bellum* versus *in bello* tendency elevates one criterion at the expense of all others, the checklist approach insists on the fulfillment of all criteria.

The espousal of the checklist approach in contemporary just war thought tends to corroborate Stephen Toulmin's observation regarding the decline of casuistic reasoning in modern moral philosophy.[61] This abandonment of casuistry in favor of what Toulmin refers to as 'timeless and universalistic principles'[62] tends to misconstrue the fundamental purpose of the just war tradition. The rationale for employing specific just war criteria is not to conclusively decide whether any given war is 'just' or 'unjust'. Indeed, it is not the answers it provides which makes just war reasoning an invaluable tool for moral reflection, but rather, the questions such moral deliberation raises. Oliver O'Donovan makes precisely this point in *The Just War Revisited*:

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[58] P. Ramsey, *The Just War: Force and Political Responsibility* (New York, Charles Scribner's Sons 1968) Ch. 12, 17.

[59] Recall Walzer's description of the inherent tension between *ad bellum* and *in bello* as the essential feature of just war theorizing. Walzer, *supra* n. 2, pp. 21-22.

[60] Yoder contends to have randomly surveyed twenty-five different lists, each claiming to describe a consensus view. See Yoder, *supra* n. 57, p. 2.

[61] S. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago, University of Chicago Press 1990) p. 32.

[62] Ibid.

> 'it is often supposed that just war theory undertakes to *validate or invalidate particular wars.* That would be an impossible undertaking. History knows of no just wars, as it knows of no just peoples … wars as such, like most large scale historical phenomena, present only a question mark, a continual invitation to reflect further.'[63]

In recent times, the most vivid illustration of the checklist approach in action was the efforts to establish objective criteria for cases of humanitarian intervention.[64] Somehow it was thought that if a universal set of criteria could be decided on in advance it would aid decision-making capacity in cases of humanitarian emergency. Instead, the outcome was a rather fruitless debate over the interpretation of specific principles, and incessant discussions over whether or not a particular case met certain threshold conditions. Ultimately, this search for objective criteria deflected serious attention away from the most pertinent questions surrounding humanitarian intervention, which happen to arise out of the relationship between the *jus ad bellum* and *jus in bello* – the crucial issue of course being how to use force in a manner consistent with the humanitarian aims of an intervention. In this regard, humanitarian operations necessitate a harmony between ends and means not sufficiently captured by the checklist approach. A genuinely balanced assessment of war must take both the *ad bellum* and *in bello* criteria into account concurrently.

2.2.3 *Misinterpreting criteria*

A final drawback of the *ad bellum/in bello* distinction is its incapacity to interpret certain just war criteria, particularly those which cut across the supposedly distinct categories of *jus ad bellum* and *jus in bello*. Two principles stand out in this regard: right intention and proportionality.

We have observed the importance of right intention in classical just war theorizing, valued in particular for its capacity to cut across the *ad bellum/in bello* divide. In just war terms a unification between the two, i.e., a *jus ad bellum* that is enjoined by *jus in bello*, is paramount. Indeed, it is the simultaneous interest in both the *jus ad bellum* and *jus in bello*, which differentiates the just war approach from pacifism and militarism, each of which tends to downplay one of these components at the expense of the other. The principle of right intentions' ability to function in this capacity accounts for the priority it was endowed in the writings of classical just war theorists. As a consequence of the division of war into two distinct ethical moments the value of right intention appears to have been lost on modern writers. In today's just war discussions, the principle of right intention is either neglected altogether – dismissed as a relic of an antiquated just war model – or it is treated as an appendage of just cause. A conflation between the principles of just cause and right intention appears in the US Catholic Bishops in their 1983 Pastoral Letter, *The*

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[63] O. O'Donovan, *The Just War Revisited* (Cambridge, Cambridge University Press 2003) p. 15.

[64] For example, see *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, IDRC 2001).

Challenge of Peace: 'Right intention is related to just cause – War can be legitimately intended only for the reason set forth above as a just cause.'[65] Similarly, in her most recent work, Jean Bethke Elshtain treats right intention as an extension of the just cause criterion:

> 'examining the evidence we see that the US military response in Afghanistan clearly meets the just cause criterion of being a war fought with the right intention – to punish wrongdoers and to prevent them from murdering civilians in the future.'[66]

A second principle frequently misapplied on account of the *ad bellum/in bello* distinction is the concept of proportionality. In modern just war discussion, the proportionality principle is applied twice, once in the *ad bellum* category and once in the *in bello* category. This division of proportionality into two completely separate judgments impedes a legitimate proportionality calculation, which demands a careful balance between the aims of war and the means of achieving it. According to Thomas Hurka:

> 'if we consider the morality of war rather than its legality, the independence of its two branches cannot be maintained. Whether an act in war is *in bello* proportionate depends on the relevant good it does, which in turn depends on its *ad bellum* just causes.'[67]

Jeff McMahan offers a similar reading of proportionality which challenges the distinction:

> 'And when there are no goods that may be pursued by means of war, there are no goods that can properly be weighed against the bad effects that an act of war would cause; therefore, no act of war can be proportionate in the absence of a just cause ….'[68]

As both examples demonstrate, the *ad bellum/in bello* distinction is not particularly well-suited to all just war principles. The correct interpretation of these principles reinforces the crucial interaction between the *ad bellum* and *in bello* categories in the moral assessment of war.

2.3 Undermining the Jus in Bello

A final limitation of the *ad bellum/in bello* distinction relates to its impact on *jus in bello* restraint. As we saw earlier, one of the stated rationales for the distinction is

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[65] US Catholic Bishops Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response,* in Reichberg et al., *supra* n. 15, p. 673.

[66] J.B. Elshtain, *Just War on Terror: The Burden of American Power in a Violent World* (New York, Basic Books 2003) p. 61.

[67] T. Hurka, 'Proportionality in the Morality of War', 33 *Philosophy and Public Affairs* (2005), pp. 34 at 44-45.

[68] McMahan, *supra* n. 55, p. 6.

an interest in tempering the conduct of war; yet, as this section will argue, the separation of *ad bellum* and *in bello* may actually tend to encourage the abandonment of restraint.

As described in Part one of this chapter, the *jus ad bellum/jus in bello* distinction developed in response to a set of historically contingent circumstances; namely, the possibility of both sides in a conflict having legitimate *jus ad bellum* claims. The prospect of 'simultaneous just cause' provided a powerful incentive for the *jus in bello* to be applied equally to each party. But if the notion of an independent *jus in bello* is premised on – and continues to be tied to – the prospect of simultaneous just cause, how is one to proceed in cases where the moral equality of both sides cannot be so easily assumed? Ian Clark has captured this dilemma:

> 'In the case where it is believed that there is only one just party to the conflict, that is, one party whose cause is just, why should that party be restrained it its prosecution of the war in the same manner as the unjust party? Since war is not a game, and we are not indifferent to its outcome in devising the rules which govern it, why should we prejudice the result by expecting the party which is fighting for a just cause to fight in such a way that it may lose?'[69]

The question raised by Clark is not simply a point of academic interest, but a real dilemma in contemporary international affairs. The nature of warfare today is such that the prospect of simultaneous just cause has become the exception rather than the rule. The most recent instances of the use of force in the international system have had an overtly punitive dimension. Anthony Lang defines punitive intervention as: 'the use of military force across national boundaries to alter the internal affairs of a state that has violated international law or other widely recognised international norms' with an aim to 'deter future violations, rehabilitate the offending state (usually by replacing is government), or to exact retribution.'[70] One can easily observe a punitive undercurrent to the recent invasions of Afghanistan and Iraq. NATO's intervention in Kosovo can also be viewed in these terms. What is most interesting in the context of these punitive interventions are arguments which seek to reinterpret the *jus in bello* in light of the apparently obvious moral superiority of one side in a conflict. This was an argument forwarded most emphatically by Ruth Wedgwood in the aftermath of the Kosovo intervention.

> 'It is commonly believed that the tactics of war must be judged independently of the purpose of a war. The divorce of purpose and tactics is designed to allow agreement on humanitarian limits even where there is no consensus on the merits of the underlying dispute. But this asserted independence of the two regimes may be no more than a fiction. Defeating Nazism, for example, required measures that are now seen as harsh and even punitive…. Kosovo, in its smaller venue, may be another illustration of that same quiet linkage. This was not a war

[69] Clark, *supra* n. 14, p. 36.

[70] A.F. Lang Jr., 'Punitive Intervention: Enforcing Justice or Generating Conflict?', in M. Evans (ed.), *Just War Theory: A Reappraisal* (Edinburgh, Edinburgh University Press 2005) p. 50.

> to settle a commercial dispute, or remap the location of a boundary valued because of mineral deposits, but rather a war to prevent ethnic expulsions. As such, its speedy conclusion was necessary. A gradual war of attrition that might defeat Belgrade in slow motion was unacceptable in light of the human survival at stake in the conflict itself. Whether one's framework is utilitarian or pure principle, it is possible to admit that the merits of a war make a difference in our tolerance for methods of warfighting.'[71]

According to Wedgwood, the unmistakable 'justness' of one side in a conflict permits that side to abandon strict adherence to the *jus in bello*. Interestingly, the same logic forwarded by Wedgwood has been applied in the context of the War on Terror, where the absence of legitimate *jus ad bellum* claims on one side has led to a denial of the *jus in bello*. Therefore, although the *jus in bello* is conceived of as independent of the *jus ad bellum*, on a practical level it is actually quite dependent on the *jus ad bellum,* given that in cases where the *jus ad bellum* resides on one side, the argument for equal application of the *jus in bello* begins to break down. In this sense, drawing a distinction between the *jus ad bellum* and *jus in bello* by no means tempers the conduct of war and may, in fact, have the opposite effect.

The argument that one side is morally in the right and need not be restrained by the *jus in bello* is certainly not new; but what is interesting is the way in which this has filtered into just war discussions. In a recent volume entitled *Just War Theory: A Reappraisal*, Mark Evans raises the possibility of scrapping the moral equality principle:

> 'The "moral equality" principle seems to be descended from an earlier "warrior ethic" that emphasised respect for combatants and which was based upon a chivalric code to be honoured regardless of the cause being fought … even if this was ever appropriate, it seems decidedly misplaced ….'[72]

In place of the moral equality principle, Evans is inclined to accept the 'unequal treatment principle'.[73]

In order enhance respect for restraint in the conduct of war; the *jus in bello* must be positioned on a more solid foundation. Given the conventional notion of a distinction between the *ad bellum* and *in bello*, restraint is currently deemed to be outside of deliberations on the use of force; indeed, the *jus in bello* is frequently said to apply 'irrespective'[74] of the *jus ad bellum*. This conceptualization frames the *jus in bello* as an issue external to the resort to force, meaning that it is easier to get left behind. Classical just war thought avoided this dilemma by perceiving a symmetrical relationship between *ad bellum* and *in bello*, which viewed the *jus in*

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[71] R. Wedgwood, 'Propositions on the Law of War after the Kosovo Campaign', in A.E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Newport, Naval College 2002) pp. 434-435.

[72] Evans, *supra* n. 70, pp. 216-217.

[73] Ibid., p. 217.

[74] The ICRC frames the issue in these terms. See ICRC, 'What are *Jus ad bellum* and Jus in Bello', 31 October 2002 <www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZJJD>.

bello as applying not *irrespective* of the *jus ad bellum* – but in support of it. In accordance with this view, the permission to wage war, 'goes hand in hand with *limitation.'*[75]

3. Conclusion: Towards A Jus Post Bellum?

This chapter has called into question the distinction between the *jus ad bellum* and *jus in bello*. Although the *ad bellum/in bello* distinction has become a defining feature of contemporary just war discussions – unanimously supported by the vast majority of just war scholars – there are a number of drawbacks associated with this approach. Three such limitations have been offered: the distinction's inherently juristic orientation, which has come largely at the expense of moral considerations; difficulties in terms of the application of just war criteria, when matters of conduct are divorced from the resort to force; and finally, the undermining of *jus in bello* restraint. These three drawbacks associated with the *jus ad bellum*/*jus in bello* distinction illuminate the need for a thoughtful reconsideration of the just war tradition's bipartite structure.

One interesting recommendation for altering the framework of just war is the idea of moving from a bipartite to a tripartite structure; that is, the proposed inclusion of a *jus post bellum* to stand alongside the conventional categories of *jus ad bellum* and *jus in bello*. The principles associated with the *jus post bellum* have been insufficiently captured within the conventional *ad bellum*/*in bello* dichotomy and in this sense the *jus post bellum* represents, for many, a logical and long overdue completion of the tradition.[76] Indeed, the concept of *jus post bellum* has gained sufficient popularity in recent years, no doubt stemming in part from the international community's marked engagement in post-conflict reconstruction and 'peacebuilding' operations. Moreover, the elusiveness of peace several years after the formal cessation of hostilities in Afghanistan and Iraq bears out the relevance of the *jus post bellum* for contemporary just war discussions.

Despite this deep-seated intuition in favor of this concept, the capacity for the *jus post bellum* to enhance just war deliberations depends on the precise manner in which it is developed. At present, just war writings which have incorporated a *jus post bellum* tend to do so within the context of an *ad bellum/in bello* divide. Hence the *jus post bellum* is simply appended as a separate just war category, completely autonomous from the *jus ad bellum* and *jus in bello*. The problem with this approach is that tends to treat the end of peace as a mere afterthought of war. In actuality, planning for peace should feature prior to the initiation of hostilities (*ante bellum*), and in that sense, be part and parcel of the *ad bellum* calculation. The recent invasion of Iraq provides a case in point, where inattention to the post-con-

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[75] Johnson, *supra* n. 6, p. xxvii.

[76] For recent just war literature incorporating *jus post bellum,* see Evans, *supra* n. 70, p. 13; M. Walzer, *Arguing about War* (New Haven, Yale University Press 2004), p. xiii; B. Orend, 'Justice after War', 16 *Ethics and International Affairs* (2002), pp. 43-56, and Orend, *supra* n. 52, Ch. 6, 7.

flict phase severely undermined the moral legitimacy of the initial resort to force. Hence, there are important linkages between the idea of *jus post bellum* and the resort to force; a connection which might potentially be overlooked were the *jus post bellum* to be treated as a 'third category', completely autonomous from the other just war categories. In this respect, the *jus post bellum* further highlights the limitations of the *jus ad bellum/jus in bello* divide.[77]

While the addition of a third just war category may not be the best way forward, this by no means implies that the elaboration of a *jus post bellum* is not a worthwhile endeavor. Indeed, the concept of peace – the essential principle of the *jus post bellum* – has the capacity to unify all phases of a conflict, therein ensuring a genuine balance between the ends and means of war. This particular approach to the *ad bellum* and *in bello* is highly reminiscent of the classical just war model, as demonstrated by the following Augustinian refrain:

> 'Peace is not sought in order to provoke war, but war is waged in order to attain peace. Be a peacemaker, then, even by fighting, so that through your victory you might bring those whom you defeat to the advantages of peace.'[78]

Here peace is not merely an afterthought of war; it is a guiding principle, present at the initiation of hostilities and continuing throughout all respective phases of war. Bearing in mind the wisdom of the classical just war model, the principles of *jus post bellum* would be best served if elaborated outside the constraints of the conventional *ad bellum/in bello* divide. In this sense, the *jus post bellum* – if developed appropriately – offers an opportunity to both correct, and overcome, the division between the *jus ad bellum* and *jus in bello.*

[77] A further issue is the definitional problem of 'post-bellum'. Often, the cessation of hostilities may not necessarily coincide with the end of fighting. In such cases, how do we define the 'post-conflict' phase, wherein the principles of *jus post bellum* may be brought into effect?

[78] St. Augustine, Letter 189, to Boniface, in Fortin and Kries, *supra* n. 8, p. 220.

Chapter 2
JUS POST BELLUM: A JUST WAR THEORY PERSPECTIVE

Brian Orend*

Abstract
This essay articulates the issue of 'justice after war' from the point of view of just war theory. It argues that this idea can and ought to impact upon international law, for instance by inspiring the eventual development of a new treaty, or Geneva Convention, exclusively concerned with issues of post-war justice. In the body of the essay, attention is first given to explaining why just war theory has traditionally ignored, or even rejected, jus post bellum. Second, argument is made as to why this ignorance and rejection must be overcome, and replaced with information and inclusion. Third, principles drawing on traditional just war theory are constructed and defended, for jus post bellum in general and for forcible post-war regime change in particular. Finally, several remaining challenges are addressed, seeking to dissolve doubts and strengthen resolve towards working for progress on this vital and topical issue of jus post bellum.

Introduction

The purpose of this article is to examine *jus post bellum* (i.e., 'justice after war') from the perspective of just war theory, as opposed to that of international law. Just war theory is a coherent set of concepts and values designed to enable systematic and principled moral judgment in wartime.[1] Traditionally, it is split into two categories: *jus ad bellum* (i.e., when it is just to start war) and *jus in bello* (i.e., how it is just to fight war, after it has begun). Within these two categories, various rules (such as those of just cause and proportionality) have been developed and defended in attempt to regulate armed conflict and render it morally permissible. It is interesting to reflect on why, until very recently, the topic of *jus post bellum* has been seriously underdeveloped compared to the first two categories. We shall return to this issue shortly.

For now, more on the contrast and interplay between just war theory and international law: whereas the former is a long-standing piece of moral and political philosophy, the latter refers generally to treaties freely agreed to by the govern-

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[1] The classic modern work of just war theory is M. Walzer, *Just and Unjust Wars* (New York, Basic Books 1977). My own recent re-working is B. Orend, *The Morality of War* (Peterborough, Broadview Press 2006).

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ments of sovereign states, wherein they promise to behave in a way detailed by the treaty. International law is thus, at least minimally, like a compendium of contracts between states. But many thinkers view international law more deeply than this, and refer to its being informed as well by long-standing customary practices and even ethical principles of so-called natural justice.[2] Indeed, just war theory – which has a pedigree stretching back through Augustine, Cicero and even to old Aristotle[3] – has, through this last source, influenced substantially the development of the international laws of armed conflict, such as The Hague and Geneva Conventions. Many concepts and values have come to be shared between just war theory and international law – such as just cause, self-defense, the need to resist aggression, last resort, proportionality, etc. – but they can and do differ, both in terms of their nature and in the full details of their conceptions of international norms (and where such originate from) and the rules they endorse (e.g., international law does not clearly endorse the just war rule of right intention).[4]

This essay, then, is located first and foremost within the confines of just war theory. How might, or should, a just war theorist think and feel about justice during the termination phase of conflict? What kind of rules and principles should be operative on political decision-makers in the post-war atmosphere? But, through just war theory, this article does intend to impact upon international law indirectly, in the way the just war tradition has always done – by offering up its deeply considered views on the ethics of war and peace up for the edification and consideration of international legal reformers, for possible inclusion in a ratified legal document. The vision, ultimately, is that of Hugo Grotius, who himself straddled the divide between just war theory and international law on this issue: to craft a compelling and persuasive theory of justice, and then hope, and work towards, the real-world realization of morality through law.[5]

To this end, this article sports the following structure. First, attention is given to explaining why just war theory has traditionally ignored or even rejected *jus post bellum*. Second, argument is made as to why this ignorance and rejection must be overcome and replaced with information and inclusion. Third, principles drawing on traditional just war theory will be constructed and defended, for *jus post bellum* in general and for forcible post-war regime change in particular. Finally, several remaining challenges and conundrums will be addressed, with the

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[2] J.L. Brierly, *The Law of Nations* (New York, Waldock 1963); H. Kelsen, *Principles of International Law* (New York, Holt, Rinehart & Winston 1966); H. Lauterpacht, *International Law*, E. Lauterpacht (ed.) (Cambridge, Cambridge University Press 1978).

[3] Orend, *supra* n. 1, pp. 9-30; James T. Johnson, *The Just War Tradition and The Restraint of War* (Princeton, Princeton University Press 1981).

[4] P. Christopher, *The Ethics of War and Peace* (Englewood Cliffs, NJ, Prentice Hall 1994; M. Howard et al., *The Laws of War* (New Haven, Yale University Press 1994); W. O'Brien, *The Law of Limited Armed Conflict* (Washington, DC, Georgetown University Press 1965). For a treatment of *jus post bellum* from a legal perspective, see C. Stahn, 'Jus ad bellum, jus in bello … jus post bellum? Rethinking the Conception of the Law of Armed Force', 17 *EJIL* (2006), pp. 921-943.

[5] H. Grotius, *The Law of War and Peace*, trans. L.R. Loomis (1949); R. Tuck, *The Rights of War and Peace* (Oxford, Oxford University Press 1999).

aim of dissolving doubts and strengthening resolve towards working for progress on this vital and topical issue of *jus post bellum*.

1. Explaining the Historical Rejection

Serious consideration needs to be given to the typical just war theorist's ignorance, or even rejection, of *jus post bellum*. Why has the termination phase been overlooked – and is there something important or significant in this very fact of its being overlooked?

One straightforward reason, I believe, is simply the inertia of tradition: just war theory began along the two established tracks of thought regarding *jus ad bellum* and *jus in bello*, and there has been a rather unreflective unwillingness to break out of the two categories. Indeed, even today it is incredible and unfortunate how many just war theorists still teach their students the theory solely from the perspective of the two older categories.

Another, deeper reason for the neglect of *jus post bellum* has been the tendency, amongst those just war theorists who do refer to *jus post bellum*, to subsume it under *jus ad bellum*. Even old Aristotle, after all, said that the aim of war had to be peace, and several other just war giants, such as Vitoria, followed with similar-sounding proclamations.[6] More recently, the dean of living just war theorists, Michael Walzer, has his one chapter on *jus post bellum* in his 1977 classic, *Just and Unjust Wars*, as part of the opening section on *jus ad bellum*.[7] So, the ruling notion seemed to be:

> 'Look, justice after war consists in achieving the just cause which justified the start of the war to begin with. For example, if the just cause was self-defence from aggression, *jus post bellum* consists in defeating and repulsing the aggressor, successfully defending one's community. Full stop and we're done.'

Now, in many ways, this conflation of *jus post bellum* into *jus ad bellum* makes sense: for instance, I want to concur that there must be a tight conceptual and empirical connection between the justice of the start of the war and the issue of whether justice will be done at war's end. But the issue is whether it can be left at that. I submit not, and that there are so many rich and complex questions of how to handle the termination phase of war that we must deal with *jus post bellum* as a category unto itself. A category substantially linked with the prior two, to be sure – conceptually, empirically, and in terms of shared values – but a category deserving of its own special consideration nonetheless. This has the further benefits – both substantial and practical – of: (i) not making *jus ad bellum* too complex; and (ii) calling more forcefully the attention of decision-makers to the importance of this third and final phase of war.

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[6] Aristotle, *The Politics*, trans. C. Lord (1984), 25 [1256b]; F. de Vitoria, *Political Writings* (Cambridge/New York, Cambridge University Press 1991), pp. 315-316.

[7] Walzer, *supra* n. 1, pp. 109-126.

Several commentators have pointed out the difficulty of diagnosing precisely the 'post' in *jus post bellum*. When do wars actually end? How long does the post-war phase last? And, especially when one considers things like violent regime change coupled with insurgent resistance – like presently in Iraq – can we even speak of the war being *over*? All great questions, but I think they are hung up too much with the word 'post': I prefer to speak of the third phase of war as 'the termination phase' to capture more accurately this sense of process even amidst endings: the achievement of the military and political objectives; the phased drawing-down of the conflict; the eventual cessation of violence; perhaps the signing of a peace treaty; and the transition from war to peace (made admittedly even more tricky in instances of regime collapse and foreign military occupation). The precise diagnosis of 'post' is, truly, difficult – but by no means should this difficulty be thought to be a good reason to give up entirely on the task of providing belligerents with guidance during the termination phase. To use a crude analogy to the sunrise: who can say, around the dawn, exactly where night ends and day begins? But eventually it is irrelevant and we all come to realize a new day has dawned, a new phase has been entered, and new and fresh activities and principles are needed.

Another, more recent reason explaining traditional just war theory's ignorance of *jus post bellum* – the most sophisticated one, in my view – has been the conviction that post-war justice ought to be limited to war crimes trials. Justice in the aftermath of war has only to do – and should be concerned *solely* with – the trial and punishment of those who have violated the laws and norms of *jus ad bellum* and *jus in bello*. This is a more principled and thoughtful articulation of *jus post bellum*, since essentially it is a doctrine about the nature and limits of post-war justice, and not its mere subsumption under another set of issues. And it seems to be a fairly popular view, since arguably the only well-developed area of thought about post-war settlements up until the 1990s was, precisely, the area of war crimes trials. For example, Walzer's Wars has two large and detailed chapters on war crimes trials, and then only the one sketchy, sweeping chapter on other aspects of post-war settlements.[8] The limits of this view, though, have to do precisely with this very cautious, conservative claim that the only issue of justice in the aftermath of war is that of criminal liability. Here, too, I submit that the answer is no: there are so many issues – of surrender, official apologies for aggression, possible compensation and sanctions, institutional reconstruction, jump-starting the economy, dealing with insurgents – that there is not sufficiently compelling reason to believe that the entire scope of post-war justice is exhausted by war crimes trials.

2. Kant's Contribution

In my view, historically the first figure to offer us truly deep, systematic and forward-looking reflections on justice after war was the German Enlightenment philosopher Immanuel Kant (1724-1804), creator of the categorical imperative and

[8] Walzer, *supra* n. 1, pp. 287-328.

author of *Perpetual Peace*.[9] More than any other thinker before him, Kant reflected intensively on the justice of peace treaties, of forcing regime change, of post-war reconstruction and of what might be needed for longer-term peace between nations. In particular, Kant favoured widespread internal regime change in the direction of human rights realization, and thought some international policies – like diplomatic engagement, cultural linkages and free trade – would help bring this about. Pro-rights societies, he predicted, would eventually band together to form a prosperous, peaceful federation of free nations. Their success, in turn, would spur other nations to change internally so as to join the club, and a kind of peaceful 'cosmopolitan federation' would grow and grow.[10]

Kant believed firmly that victory in war does not, of itself, confer rights upon the victor which the vanquished is duty-bound to obey. Might does not equal right. The victor thus has no right, through the raw fact of military success, to punish the vanquished or to seek compensation. In fact, the victor must respect the rights of the people of the vanquished country to be sovereign and self-determining. But against a vanquished enemy who was clearly unjust in terms of the war's beginnings (for instance, by being the blatant rights-violating aggressor), Kant says the people of such a state 'can be made to accept a new constitution of a nature that is unlikely to encourage their warlike inclinations.' This remark seems to form a limiting condition to what may be done to states in the aftermath of a war: provided that there clearly was a blatant aggressor (whose policies 'would make peace among nations impossible') and that it has been defeated, the very most which can be done to it in vindication of international law and order is the establishment of a more peaceable and progressive social order within it.[11]

The other vital thing about Kant is this: he insisted that we view the end of a war as an opportunity not just to finalize that particular conflict but, moreover, to contribute to and strengthen the peace and justice of the international system more broadly.[12] This is an excellent insistence, I believe, which forces just war theory and international law to confront deeper and longer-term issues of international justice at the conclusion of conflict, and refuses to treat wars as isolated, atomic units to be each evaluated using rules and laws but then considered 'closed' after that – as if wars do not have profound rippling effects, through both time and space, into the future and into other countries and regions.

3. The Case for Having, and not Ignoring, Jus Post Bellum

There should be a category of *jus post bellum* in just war theory; the historical ignorance of this category by the theory must be remedied; and it ought to draw on

[9] I. Kant, *Perpetual Peace and Other Essays*, trans. T . Humphrey (1983).

[10] B. Orend, *War and International Justice: A Kantian Perspective* (Waterloo, Wilfrid Laurier University Press 2000), pp. 15-89.

[11] I. Kant, *The Doctrine of Right*, in his *Political Writings*, trans. H.B. Nisbet (1995), pp. 169-171 (P 348-49).

[12] B. Orend, 'Kant's Just War Theory', *Journal of the History of Philosophy* (1999), pp. 323-353.

insights from Kant. Not just that, there should be another Geneva Convention, this one focusing exclusively on *jus post bellum* – i.e., with what the winners of war may and may not do to countries and regimes they have defeated. There needs to be both moral and legal completion and comprehensiveness in connection with the ethics of war and peace. Why?

Conceptually, war has three phases: beginning, middle and end. So if we want a complete just war theory – or comprehensive international law – we simply must discuss justice during the termination phase of war. After all, there is no guarantee that if you fought justly, for the sake of a just cause, then you will automatically impose a just set of peace terms upon your vanquished enemy. Mistakes are possible, and made frequently, during each of the three phases. It is, indeed, difficult to fight a truly just war.

Failure to include *jus post bellum* in your just war theory leaves you open to a sharp, potentially devastating objection from both realists and pacifists, namely, that just war theory fails to consider war in a deep enough, systematic enough kind of way. It simply considers war on a case-by-case basis, dusting off its precious old rules for yet another ethical application. Pacifists, for example, have long objected that just war theory, with its hitherto narrow focus, is fundamentally passive and complaisant about war – that it does not ultimately care why war breaks out and does not seek to improve things after war's end so as to make the international system more peaceful over the longer term (Kant's point).[13] I believe this objection succeeds against just war theorists who have no account of *jus post bellum*; if we are not to meet their sorry fate, we must include such an account to surmount this challenge.

More concretely, recent armed conflicts – in Bosnia and Kosovo, in central Africa, in Afghanistan and twice in Iraq – demonstrate the difficulty and illustrate the importance and controversy surrounding a just peace settlement. The major issues of contemporary international affairs simply demand we look at *jus post bellum*. We know, for instance, that when wars are wrapped up badly, they sow the seeds for future bloodshed. Some people, e.g., think that America's failure to remove Saddam Hussein from power after they first beat him in 1991 prolonged a serious struggle and eventually necessitated the second war, of regime change, in 2003. Would the second war have happened at all had the first been ended differently – i.e., more properly and thoroughly, with a longer-range vision in mind? Many historians ask the exact same question of the two World Wars and the recent, related Serb wars, first in Bosnia and then over Kosovo.[14]

Failure to construct principles of *jus post bellum* is to allow unconstrained war termination. And to allow unconstrained war termination is, as the realist says,

[13] R. Holmes, *On War and Morality* (Princeton, Princeton University Press 1989); R. Norman, *Ethics, Killing and War* (Cambridge, Cambridge University Press 1995); P. Ackerman and J. DuVall, *A Force More Powerful* (New York, St Martins Press 2000).

[14] T. Abdullah, *A Short History of Iraq* (London, Longman 2003); J. Keegan, *The First World War* (New York, Alfred A. Knopf 1999); J. Keegan, *The Second World War* (New York, Viking 1990); W. Clark, *Waging Modern War: Bosnia, Kosovo and The Future of Combat* (New York, Public Affairs 2002); B. Orend, 'Crisis in Kosovo: A Just Use of Force?', *Politics* (1999), pp. 125-130.

to allow the winner to enjoy the spoils of war. But this is dangerously permissive, since winners have been known to exact peace terms which are draconian and vengeful. The Treaty of Versailles is often mentioned in this connection. It is commonly suggested that the sizable territorial concessions, and steep compensations payments, forced upon Germany created hatred and economic distress, opening a space for Hitler to capitalize on, saying in effect: 'Let's vent our rage by recapturing our lost lands and let's rebuild our economy by refusing to pay compensation, and by ramping up war-related manufacturing.'[15]

Failure to regulate war termination probably prolongs fighting on the ground. Since they have few assurances, or firm expectations, regarding the nature of the settlement, belligerents will be sorely tempted to keep using force to jockey for position. Since international law imposes very few clear constraints upon the winners of war, losers can conclude it is reasonable for them to refuse to surrender and, instead, to continue to fight. Perhaps, they think, 'we might get lucky and the military tide will turn. Better that than just throw ourselves at the mercy of our enemy.' Many observers felt this reality plagued the 1992-95 Bosnian civil war, which had many failed negotiations and a three-year 'slow burn' of continuous violence as the very negotiations took place.[16]

The manifest and manifold difficulties of post-war reconstruction – illustrated most graphically in present-day Afghanistan and Iraq – suggest that even war winners would profit substantially by having firm and objective guidelines against which to measure achievements and to create timelines for both progress and eventual withdrawal.

Peace treaties should still, of course, remain tightly tailored to the historical realities of the particular conflict in question. There are all kinds of nitty-gritty detail integral to each peace treaty. But admitting this is not to concede that the search for general guidelines, or universal standards, is futile or naive. There is no inconsistency, or mystery, in holding particular actors, in complex local conflicts, up to more general, even universal, standards of conduct. Judges and juries do that on a daily basis, evaluating the factual complexities of a given case in light of general moral and legal principles. We should do the same regarding war termination, and not just morally but also legally. The goal of the rest of this article, accordingly, is to offer for consideration one general set of plausible principles to guide communities seeking to resolve their armed conflicts fairly and decently.

4. Suggested Principles of a Jus Post Bellum in General

The first step is to answer the question: what may a participant rightly aim at with regard to a just war? What are the goals to be achieved by the settlement of the

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[15] M. MacMillan, *Paris 1919* (Maryland, USA, Random House 2003); M. Boemeke et al., *The Treaty of Versailles* (New York, Cambridge University Press 1998).

[16] D. Reiff, *Slaughterhouse: Bosnia and The Failure of the West* (New York, Simon and Schuster 1995); Orend, *supra* n. 1, pp. 98-101.

conflict? We need some starting assumptions to focus our thoughts on these issues. First, we will consider classical cases of inter-state armed conflict to provide a quicker, cleaner route to the general set of post-war principles sought after. But I do believe that these principles, owing to their generality and moral strength, clearly apply as well to non-classical wars, such as multi-faction civil wars with foreign intervention. The point here is to fashion an overall blueprint which can be amended, as details demand, in particular as well as unconventional cases.

The next assumption is that the forthcoming set of post-war principles is offered as guidance to those participants who want to end their wars in a fair, justified way. Not all participants do, of course, and to that extent they act unjustly during the termination phase. Violations of *jus post bellum* are just as serious as those of *jus ad bellum* and *jus in bello*. Like *jus ad bellum*, responsibility for fulfilling *jus post bellum* is primarily political as opposed to military, although some cases may blur that line, for instance if there is a need to impose short-term, direct military occupation over a shattered society. A related assumption – Kant's, which I wish to stress – is that there is no such thing as 'victor's justice'. The raw fact of military victory in war does not, of itself, confer moral rights upon the victor, nor ethical duties upon the vanquished. It is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of rights and duties, of both victor and vanquished, at the conclusion of armed conflict.

This is to say, importantly, that when or if an aggressor wins a war, the peace terms will necessarily be unjust. The injustice of cause infects the conclusion of the war. Unlike other just war theorists, I believe that the three just war categories are not separate but, rather, connected. And *jus ad bellum* sets the tone and context for the other two categories, and to that extent is probably the most important. This is not to say that meeting *jus ad bellum* will automatically result in your meeting *jus in bello* and *jus post bellum*. But it *is* to say, conversely, that failure to meet *jus ad bellum* results in automatic failure to meet *jus in bello* and *jus post bellum*. Once you are an aggressor in war, everything is lost to you, morally.[17]

Now, we might still say that some terms which a victorious aggressor imposes are better or worse than others which it could have. A winning aggressor might – though it is unlikely – have milder peace terms than what we expected. But we cannot call these terms *just*, since they remain the product of a war which, overall, was unjust. So, for the rest of this article, I shall assume that the winning side fought the war with *jus ad bellum* on its side. It is in this sense that I develop an 'ideal' conception of post-war justice, to arrive at some rules and values against which we can measure and evaluate the non-ideal cases with which the world confronts us.

With these assumptions declared, let us return to our opening question: what are the ends or goals of a just war? The general answer is a more secure

[17] I defend this more thoroughly throughout Orend, *Morality of War*, *supra* n. 1, and direct readers as well to the excellent work of David Rodin.

possession of our rights, both individual and collective. The aim of a just and lawful war, we know, is the resistance of aggression and the vindication of the fundamental rights of societies, ultimately on behalf of the human rights of their individual citizens. These values revolve around the concept of a minimally just and hence legitimate community. Such a community is one which does all it reasonably can to: (i) gain recognition as being legitimate in the eyes of its own people and the international community; (ii) adhere to basic rules of international justice and good international citizenship, notably non-aggression; and (iii) satisfy the human rights of its individual members (to security, subsistence, liberty, equality and recognition).[18]

From this general principle – that the proper aim of a just war is the vindication of those rights whose violation grounded the resort to war in the first place – more detailed commentary needs to be offered. For what does such 'vindication' of rights amount to: what does it include; what does it permit; and what does it forbid? The last aspect of the question seems to be the easiest to answer, at least in abstract terms: the principle of rights vindication forbids the continuation of the war after the relevant rights have in fact, been vindicated. To go beyond that limit would itself become aggression: men and women would die for no just cause.[19] This bedrock limit to the justified continuance of a just war seems required in order to prevent the war from spilling over into something like a Crusade, which demands the utter destruction of the demonized enemy. The very essence of justice of, in, and after war is about there being firm limits, and constraints, upon its aims and conduct. Unconstrained fighting, with its fearful prospect of degenerating into barbaric slaughter, is the worst case scenario – regardless of the values for which the war is being fought.

This emphasis on the maintenance of some limits in wartime has the important consequence that there can be no such thing as a morally-mandated unconditional surrender. The principles vindicated successfully by the just state themselves impose outside constraints on what can be done to an aggressor following its defeat. This line of reasoning might spark resistance from those who view favorably the Allied insistence on 'unconditional surrender' during the closing days of WW II. But we need to distinguish here between rhetoric and reality. The policy of unconditional surrender followed by the Allies at the end of that war was not genuinely unconditional; there was never any insistence that the Allies be able to do whatever they wanted with the defeated nations, as it was for instance standard to do in ancient Greek and Roman times. Winston Churchill himself said that 'we are bound by our own consciences to civilization ... [we are not] entitled to behave in a barbarous manner.'[20] At the very most, the policy which the Allies pursued was genuinely unconditional only *vis-à-vis* the governing regimes of the Axis powers, but not *vis-à-vis* the civilian populations in those nations. Such a more discriminat-

[18] Orend, *supra* n. 1, pp. 33-40; B. Orend, *Human Rights: Concept and Context* (Peterborough, Broadview Press 2002).

[19] Walzer, *supra* n. 1, pp. 109-124.

[20] Churchill quoted in Walzer, *supra* n. 1, p. 112.

ing policy on surrender may be defensible in extreme cases, involving truly abhorrent regimes, but is generally impermissible. For insistence on unconditional surrender is usually disproportionate and will prolong fighting as the defeated aggressor refuses to cave in, fearing the consequences of doing so. Walzer believes this was the case during the Pacific War, owing to the United State's insistence on Japan's unconditional surrender. Japan kept fighting because of this insistence, and eventually the United States resorted to atomic weapons to end the struggle. Walzer believes that the atom bombs would not have been necessary at all had the United States had a more reasonable policy regarding surrender in the first place.[21]

It is thus the responsibility of the victor to communicate clearly to the losing aggressor its sincere intentions for post-war settlement, intentions which must be consistent with the other principles of post-war justice here developed. This means that some serious planning must go into the post-war phase right from the start. Winners, like the United States over Iraq in 2003, should never find themselves in a position where they have won the war but they do not know what to do now, and so start making up post-war policy on the fly. That is irresponsible and the potential for bad decisions probably skyrockets.[22]

What does the just aim of a just war – namely, rights vindication, constrained by a proportionate policy on surrender – precisely include or mandate? The following is a plausible list of principles regarding what would be at least permissible with regard to a just settlement of a just war:

4.1 Rights vindication

The settlement should secure those basic rights whose violation triggered the justified war. The relevant rights include human rights to life and liberty and community entitlements to territory and sovereignty. This is the main substantive goal of any decent settlement, ensuring that the war will actually have an improving affect. Respect for rights, after all, is a foundation of civilization, whether national or international. Vindicating rights, not vindictive revenge, is the order of the day.

4.2 Proportionality and publicity

The peace settlement should be measured and reasonable, as well as publicly proclaimed. To make a settlement serve as an instrument of revenge is to make a volatile bed one may be forced to sleep in later. In general, this rules out insistence on unconditional surrender.

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[21] Walzer, *supra* n. 1, pp. 109-124, 263-268; M. Walzer, 'Untitled', *Dissent* (Summer 1995), p. 330.

[22] B. Woodward, *Plan of Attack* (New York, Simon & Schuster 2004); R. Scarborough, *Rumsfeld's War* (Washington, Regnery Publishing 2004); J. Carroll, *Crusade: Chronicles of an Unjust War* (New York, Metropolitan Books/Henry Holt & Co. 2004).

4.3 Discrimination

Distinction needs to be made between the leaders, the soldiers, and the civilians in the defeated country one is negotiating with. Civilians are entitled to reasonable immunity from punitive post-war measures. This rules out, I believe, sweeping socio-economic sanctions as part of post-war punishment.

4.4 Punishment

When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes. Why must there be punishment at all? Why can we not just cancel the aggressor's gains, and then live and let live? Three reasons suggest themselves. First, the obvious – yet powerful – one of deterrence. Punishing past aggression deters future aggression, or at least does so more than if we had no punishment at all. No punishment seems a lax policy which actually invites future aggression. Secondly, proper punishment can be an effective spur to atonement, change and rehabilitation on the part of the aggressor. Finally, and most powerfully, failing to punish the aggressor degrades and disrespects the worth, status and suffering of the victim. Note also that soldiers can commit their own kind of war crimes. Justice after war requires that such soldiers, from all sides to the conflict, likewise be held accountable to investigation and possible trial.

4.5 Compensation

Financial restitution may be mandated, subject to both proportionality and discrimination. A post-war poll tax on civilians is thus generally impermissible, and there needs to be enough resources left so that the defeated country can begin its own reconstruction. To beggar thy neighbour is to pick future fights.

4.6 Rehabilitation

The aggressor state might also require some demilitarization and political rehabilitation, depending on the nature and severity of the aggression it committed and the threat it would continue to pose in the absence of such measures. 'One can', Walzer advises, 'legitimately aim not merely at a successful resistance but also at some reasonable security against future attack.'[23] The question of forcible, forward-looking rehabilitation is one of the most controversial and interesting surrounding the justice of settlements. It shall be dealt with separately in the next section.

The terms of a just peace should satisfy all these requirements. There needs, in short, to be an ethical 'exit strategy' from war, and it deserves at least as much

[23] Walzer, *supra* n. 1, p. 118.

thought and effort as the purely military exit strategy so much on the minds of policy planners and commanding officers. Any serious defection, by any participant, from these principles of just war settlement should be seen as a violation of the rules of just war termination, and so should be punished. At the least, violation of such principles mandates a new round of diplomatic negotiations – even binding international arbitration – between the relevant parties to the dispute. At the very most, such violation may give the aggrieved party a just cause – but no more than a just cause – for resuming hostilities. Full recourse to the resumption of hostilities may be made only if all the other traditional criteria of *jus ad bellum* – proportionality, last resort, etc. – are satisfied in addition to just cause.

Metaphorically, a war, justly prosecuted, is something like radical surgery: an extreme yet necessary measure to be taken in defense of fundamental values, such as human rights, against severe threats to them, like violent aggression. And if just war, justly prosecuted, is like radical surgery, then the justified conclusion to such a war can only be akin to the rehabilitation and therapy required after the surgery. This is in order to ensure that the original intent is effectively secured – namely, defeating the threat and protecting the rights – and that the patient is materially better off than prior to the exercise. The 'patient' in this case is, in the first instance, the victim(s) of aggression. Secondarily, it refers to the international community generally – including even the aggressor(s) or, at least, the long-term interests of the civilians in the aggressor(s).[24]

5. Suggested Principles for Forcible Post-War Regime Change in Particular

5.1 **The goal of justified regime change**

The goal of justified post-war regime change – that is of coercive rehabilitation of a defeated aggressor – is the timely construction of a minimally just political community. All warfare, ultimately, is about the governance of a territory and so all the deepest questions of war must revolve around issues of authority and legitimacy: who gets to govern a population within a territory, and how ought they, at least minimally, to do so?[25] Again, a minimally just community makes every reasonable effort to: (i) avoid violating the rights of other minimally just communities; (ii) gain recognition as being legitimate in the eyes of the international community and its own people; and (iii) realize the human rights of all its individual members. Since the imposition by force of any standard in the post-war environment is such serious and controversial business, a justification needs to be provided. Here, only a quick

[24] This image of just war as radical surgery, and just settlement as the subsequent therapy, came to mind while reading N. Oren, 'Prudence in Victory' in N. Oren (ed.), *Termination of War: Processes, Procedures and Aftermaths* (Jerusalem, Hebrew University Press 1982), pp. 147-164.

[25] Orend, *supra* n. 1, pp. 2-4; C. Clausewitz, *On War*, trans. A. Rapoport (1995).

one can be provided.[26] The ideal of a human rights-respecting, minimally just political community is a justified one because

- it is in every individual's self-interest;
- it respects everyone's potential for autonomy and self-direction;
- it thus has universal appeal;
- it already enjoys very strong international consensus;
- it is based on thin, reasonable and accessible values like living a minimally good life;
- it generates good consequences, especially in terms of average quality of life; and
- it promotes long-term international peace and stability.

It is these values – their strength and moral resonance – which ground regime changing measures in a post-war environment. These are not extreme, narrow, 'crusading', or 'imperialistic' values; they are modest, secular, widely accepted and based on appeal to the first principle of respecting individual rights as well as to after-the-fact considerations of generating concrete beneficial consequences for everyone. Moreover, successful coercive post-war regime change along these lines was actually done in Germany and Japan (1945-1955), and so it is neither conceptually nor empirically impossible.[27] In fact, a review of the literature[28] shows something of an ideal 10-point recipe for transforming a defeated aggressor into a minimally just regime.

Before sketching out this recipe, consider Kant's interesting and provocative quote, noted above, that: 'They can only be made to accept a new constitution of a nature … unlikely to encourage their warlike inclinations.'[29] He clearly believed forcible regime change permissible. His moral test involved considering whether one's policies or actions would, if everyone else did the same thing, lead to contradiction or inhumanity. A brutal, rights-violating state obviously acts inhumanely, and if all states behaved like aggressors it would 'make peace among nations impossible'. Thus, states failing minimal justice forfeit rights of existence. Kant hastens to add, however, that other states should not simply carve up and 'ingest' the offending state and its territory, since that would ignore completely the wishes and rights of the local population. The local population does have the right to exist as a people, but it does not have the right to establish an aggressive or

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[26] For much more detail on justifying this conception of a legitimate political community, see Orend, *supra* n. 1, pp. 31-54 and Orend, *supra* n. 18, pp. 67-100.

[27] E. Davidson, *The Death and Life of Germany: An Account of the American Occupation* (New York, Alfred A. Knopf 1999); H. Schonberg, *Aftermath of War: Americans and The Re-making of Japan* (Kent, Ohio, Kent State University Press 1989).

[28] See Orend, *supra* n. 1, pp. 160-219 and especially J. Dobbins et al., *America's Role in Nation-Building: From Germany to Iraq* (Santa Monica, CA, Rand Publishing 2003) and J. Dobbins et al., *The United Nations' Role in Nation-Building* (Santa Monica, CA, Rand Publishing 2004).

[29] I. Kant, *The Metaphysics of Morals*, trans. H.B. Nisbet in *Kant: Political Writings* (1991), p. 170.

rights-violating state. Kant concludes that the most reasonable, middle-ground solution in such a difficult case is that the people stay together as a people but they must accept a new, 'less war-like constitution'. Forcible regime change – under certain circumstances – is, far from being a radical, reckless adventure in imperialism, actually a sound compromise between the two extremes of conquest, on the one hand, and, on the other, letting terrible regimes exist and thrive.[30]

This puts the vital issue of entitlement nicely: regimes which are not minimally just have no right to govern, and so are in no position to complain should they be overthrown. But what about the right of the people there to be self-governing? National self-determination, I submit, is not an end-in-itself; it is good only insofar as it results in a minimally just society. A people never has the right to establish an aggressive or human rights-violating regime, any more than a crook has the right to beat up people as a form of his 'freedom of expression'. We can imagine cases – indeed, know of cases – where a people lack the means for constructing a minimally just society. Perhaps they lack the resources and expertise, are deeply divided, have been exhausted by war, or flat out refuse out of blinkered nationalism or ideology. In all these cases, they can justly be forced to accept a new, minimally just regime in the post-war period provided the war was just. If the war was not just, they cannot be so forced but they should certainly be helped if they freely request it. Owing to the power of the idea of a minimally just political community, we should not be surprised to see locals clamouring for this option and for help. The new regime must then eventually get endorsement and show its local legitimacy – ideally through direct election – and then that effectively cements its right to govern. If the locals still do not like it, they can turf the government out and start again – but always within the confines of minimal justice.

So, and this is the heart of this section, forcible post-war regime change is permissible provided: (i) the war itself was just and conducted properly; (ii) the target regime was illegitimate, thus forfeiting its state rights; (iii) the goal of the reconstruction is a minimally just regime; and (iv) respect for *jus in bello* and human rights is integral to the transformation process itself. The permission is then granted because the transformation: (i) violates neither state nor human rights; (ii) its expected consequences are very desirable, namely, satisfied human rights for the local population and increased international peace and security for everyone; and (iii) the post-war moment is especially promising regarding the possibilities for reform. And the transformation will be successful when there is: (i) a stable new regime; (ii) run entirely by locals; which is (iii) minimally just. The 2003 Dobbins Report, one of the first-ever extensive empirical considerations of recent post-war reconstructions, suggests that this kind of success probably takes from seven to ten years to achieve.[31]

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[30] Kant, *supra* n. 29, pp. 170-171; Orend, *supra* n. 12.
[31] Dobbins, *supra* n. 28.

5.2 The process for achieving the goal

We now know the goal – a minimally just society – and so we now ask: what is the process for achieving it? Follow the historically-grounded recipe:[32]

Adhere diligently to the laws of war during the regime take-down and occupation
This is morally vital for its own sake, as well as to help win the hearts and minds of the locals and to establish the legitimacy of the occupation. The United States, of course, has notoriously run afoul of this principle in Iraq, owing to the prisoner abuse scandal at the Abu-Ghraib prison.

Purge much of the old regime, and prosecute its war criminals
Much, but not necessarily all. Clearly, anyone materially connected to aggression, tyranny or atrocity cannot be permitted a substantial role in the new order. They have lost the right to govern. But others – say, middle-ranking civil servants – might be kept on for their local knowledge and bureaucratic expertise. There always needs to be some continuity, even in the face of a change in institutions.

Disarm and demilitarize the society
The target military does need to be disarmed and demobilized – but then something needs to be done with them. Many critics of the American occupation of Iraq argue that a key decision which helped spark the on-going insurgency was the United States choice to promptly disband the 400,000 strong Iraqi army … and then leave them to their own devices. Plans for employing these potentially dangerous men, providing them opportunity, should have been developed. Some of them – not so much the officer class as ordinary soldiers – might even be selectively re-mobilized under a reconstituted command structure. This might actually add some desperately needed stability to the situation.[33]

Provide effective military and police security for the whole country
Most experts suggest a two-stage approach here: the successful 'attack and overthrow' war divisions be replaced by other divisions specifically trained in post-combat peace-keeping and nation-building. Whether this latter force should be multinational, or UN-led, is taken up below. But the transition should be as seamless as possible, and the ratios are crucial. The nation-building research shows you need about 20 soldiers per 1,000 residents to stabilize and secure post-war populations. Incidentally, both the Afghanistan and Iraq occupation forces are – as of writing – well short of this ratio. The moral is to go in big, with plenty of 'boots on the ground': boots tutored in what The Pentagon labels 'stability operations'. Show the locals strong – not hesitant – intentions to protect them and to provide a secure

[32] I detail and explain and apply this recipe more in Orend, *supra* n. 1, pp. 160-219.

[33] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), pp. 40-41; Report of the Secretary-General, *The Causes of Conflict and The Promotion of Durable Peace in Africa,* 16 April 1998.

back-drop for the development of law and legitimacy, to say nothing of the economy and the re-birth of a peaceful and regular pace of life.[34]

Work with a cross-section of locals on a new, rights-respecting constitution which features checks and balances

Limited government is required to prevent re-growth of tyranny; legitimate government is needed both for moral fitness and for stability. The picture here is of a genuine political partnership between the war winner and the local civilian population. The facts show that the meaningful participation and support of both is absolutely necessary, and usually more extensive international participation is desirable as well. Constitution-making is a process, and so we cannot rationally expect perfection or closure the first time out. Even the most developed societies occasionally change their constitutions and/or take several tries before creating a workable one in the first place. So while the post-war atmosphere is pressured, and there is a desire to rapidly end foreign occupation, some patience is required on the part of everyone. Good things often take time. In terms of inclusion in the constitution-building process, Andrew Arato reminds us that every group must be included: (i) whose non-participation could ruin any subsequent arrangement; and (ii) who is committed to the creation of a minimally just state. If these two conditions are met, all relevant groups – as guided by the war-winner – are to develop an inclusive framework for limited, accountable and rights-respecting government. Unlike the security situation, there has been some clear progress here on the fronts of constitutions and elections both in Afghanistan and Iraq. But, in Iraq, the lingering problem is whether even the new, decentralized constitution is flexible enough to hold together the three communal groups – Kurd, Shi'ite and Sunni – who so deeply distrust each other and who have so many grievances against each other and who seem to want such different things from the future.[35]

Allow other, non-state associations, or 'civil society', to flourish

Civil society associations refer to all groupings which do not involve the state. Research stresses how important such associations are, not only to enjoyment of life but also to people's commitment to their society. These groupings connect people to each other, provide satisfaction and promote non-political aspects of life. They serve to take pressure off the state (by providing diverse outlets for energy and indeed by helping to provide resources and help to their members), they help to legitimize the society (by increasing participation and happiness) and they also indirectly limit state power (by showing there's more to life than politics). It is always the mark of a tyrannical government when there is little activity within civil society. Robust civil societies are thus an important ingredient in creating mature, legitimate social conditions.[36]

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[34] J. Traub, 'Making Sense of the Mission', *New York Times Magazine* (11 April 2004), p. 36.

[35] A. Arato, 'Constitution-Making in Iraq', *Dissent* (Spring, 2004) pp. 32-36; A. Arato, *Civil Society, Constitution and Legitimacy* (Lanham, MD, Rowman & Littlefield 2000).

[36] D. Eberly et al., *The Essential Civil Society Reader* (Lanham, MD, Rowman & Littlefield 2000); R. Putnam, *Bowling Alone* (New York, Simon & Schuster 2000).

Forego compensation and sanctions in favour of investing in and re-building the economy

Many modern peace arrangements – notably the Treaty of Versailles and the terms ending the Persian Gulf War[37] – unraveled, or created perverse consequences, when they included hefty compensation terms and sweeping sanctions. Targeted compensation might still be justified but, beyond that and war crimes trials, punitive settlements do not seem to work. The goal of proper regime change is the creation of a stable, minimally just social condition. This is difficult enough as it is; trying to achieve it while detracting resources out of the target country becomes nearly impossible. (Thankfully, in Iraq in 2003, the old punitive sanctions were dropped, and investment started to flow in.) This need for funds is a strong argument for including international partners in reconstruction. Realistically speaking, though, such partners will probably volunteer their resources only if they believe the war was justified to begin with.

If necessary, revamp educational curricula to purge past propaganda and cement new values

The fascists in the 1930s used school systems to warp future citizens so that they would subscribe to highly destructive doctrines of racial and national supremacy, with the flip-side being hatred and aggression against 'Others'. (In Afghanistan under the Taliban, and elsewhere still in the Middle East, great controversy attaches to the teaching of Islamic extremism and its attitudes towards violence, Israel, the West and women in particular. Much development research powerfully shows the beneficial effects of massive commitment to the education of girls and women. Indeed, some have even pronounced this one of the few 'silver bullets' in development, which correlates very strongly with such other desirable social outcomes as economic growth, life expectancy and internal political stability.)[38]

Ensure that the benefits of the new order will be: (i) concrete; and (ii) widely, not narrowly, distributed

As Michael Walzer says, you have to increase everyone's stake in the new, developing order. In particular, you must avoid a situation where it seems that the foreign occupier is favouring one group above the rest, giving that group most of the power. That group will soon be marked as traitors and foreign agents, and will lose legitimacy and popular support. This was frequently the case during the European colonial era – particularly with France and Belgium – when the colonizer would select an elite group to rule, creating bitter ethnic and communal rivalries which persist today. The reconstructions of Germany and Japan showed, by contrast, that there must be widespread concrete benefits distributed throughout the population to make

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[37] On Versailles, see *supra* n. 15; on the Gulf War, see: Orend, *supra* n. 1, pp. 181-86; J.T. Johnson and G. Weigel (eds.), *Just War and Gulf War* (Washington, DC, Ethics and Public Policy Center 1991); and G. Simons, *The Scourging of Iraq* (New York, St. Martin's Press 2000).

[38] M. Nussbaum, *Women and Human Development* (2004). See also the website: <www.unicef.org/girlseducation/index.html>.

reconstruction work. Political things like getting to vote and run for office where you could not before; civic things like having your daughter go to school where before she could not, social things like starting up reading clubs where they used to be banned; and, above all, economic things like an average rise in living standards within a reasonable time. In both Afghanistan and Iraq, there is a lack of sense thus far that their lives are concretely better off than before the wars, and there are serious squabbles over fair shares of resources and who should end up getting what. Of over-riding concern, in both societies, is The Big Two Necessary Conditions for Progress: (i) widespread physical security from violence; and (ii) widespread increase in average living standards. Peace and cash, truly, are the vital ingredients in jump-starting successful post-war reconstructions.[39]

Follow an orderly, not-too-hasty exit strategy when the new regime can stand on its own two feet

This requires walking a fine line. On the one hand, the foreign occupier cannot stay forever – for that is conquest, not reconstruction. The locals must see that occupation will come to an end and they will return to full sovereignty. This knowledge should diffuse some tension, and help spur the locals to stand up and take some responsibility for the future shape of their own society. On the other hand, if you are going to do something as important as post-war rehabilitation, you should try to do it well. Plus there is a moral responsibility not to 'cut and run'. A botched reconstruction benefits no one, including impatient locals.

This ten-point recipe for reconstruction is only a general blueprint; clearly, in particular cases, some things will need to be emphasized over others. The best recipes always allow for individual variance and input depending on time and the ingredients at hand. We should also note the heavy interconnectedness of many of these elements. US Major-General William Nash is probably only exaggerating a little when he declares: 'The first rule of nation-building is that everything is related to everything, and it's all political.'[40] Further, in spite of the variances among aggressive, rights-violating societies – different geography, history, language, economy, diet, ethnic composition – there has been striking similarity in the kind of regime here in view. Think of the major 20th century aggressors and dictatorships: the USSR; Fascist Spain and Italy; Nazi Germany; Imperial Japan; North Korea; Communist China; Pol Pot's Cambodia; Idi Amin's Uganda; Saddam Hussein's Iraq; the Taliban's Afghanistan. In spite of all the differences among them, the regimes shared large affinities: a small group of ruthless fanatics uses force to come to power; it keeps power through the widespread use of violence, both internally and externally; it engages in massively invasive control over every major sphere of life, with no other associations allowed to rival the state's prestige; the rule of law is jettisoned; the military, or 'in' party, becomes all-important; human rights are trampled upon, and

[39] M. Walzer, *Arguing About War* (New Haven, Yale University Press 2004*)*, pp. 164-165; Dobbins, *supra* n. 28.

[40] Nash, quoted in Traub, *supra* n. 34, p. 35.

so on.[41] To a remarkable extent, in spite of all the other differences, it has been the same kind of regime. And this should not, in the end, come as so much of a surprise: they all learned from each other and sought to emulate what worked elsewhere. The modern police state only has so many precedents to draw upon, and might in fact be located ultimately in such early examples as Napoleonic France, or most probably Robespierre's Reign of Terror during the French Revolution.[42] So, then, we should not be all that shocked, surprised and sceptical if it turns out that one general recipe can, in fact, be found for transforming such regimes and societies away from rampant rights-violation into ones which are at least minimally just.

6. Conundrums and Challenges

6.1 **Who should be in charge?**

This leaves the large issue of who should be the main players in post-war reconstruction. The war winner? The international community? The locals? The Dobbins Report, interestingly, finds in repeated cases that the commitment, presence and investment of the war winner is the most necessary factor in the success of post-war reform. That is apparently a fact of which we need to be mindful. There is also the value of the goal of minimal justice and our desire to see it actualized, which calls our attention to these power realities. Another fact is this: reconstruction needs to take place within a secure context, and the war-winner is clearly best positioned to provide this – at least initially. There is the relative responsibility argument, too: the war winner, after all, was the one who overthrew the regime. Having 'broken it', the war winner 'bought it', that is shouldered the main responsibility for aiding the reconstruction of a replacement regime. Thus, to call for war winners to promptly leave upon overthrowing the old, decrepit regime is mistaken, naive and unhelpful.

This is not a clarion call for triumphant unilateralism, much less 'neo-imperialism'. It is a judgment informed by: (i) the facts of who can secure the society; (ii) who most bears responsibility; and (iii) who can effectively leverage successful post-war regime change. Clearly, local involvement and endorsement is, eventually, a make-or-break deal. No one can deny that. Given the good values of just reconstruction (compared with what went before), we should not worry about finding such support. Indeed, the cases show there are many locals to be found, in every society, who see the sense of minimal justice and who wish to take up leadership roles in the reconstruction process. It is more an issue of when and how to transfer reconstruction authority to a reconstituted and legitimate state structure, and that is clearly to be determined on a case-by-case basis. Local input – meaningful cross-sectional consultation – has to be there right from the start, and gradually grow to fully restored sovereignty, probably about 10 years later. The war winner

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[41] J. Glover, *Humanity: A Moral History of the 20th Century* (New Haven, Yale University Press 2001).

[42] L. Hunt (ed.), *The French Revolution and Human Rights* (New York, Bedford Books 1996).

must always understand – as Chapter XI of the UN Charter (which deals with 'Non-self-governing territories') says – that it occupies a position of 'sacred trust' in this regard. The war winner cannot ever forget, as the International Commission on Intervention and State Sovereignty (ICISS) says, that its reconstructive activities must be aimed at 'putting itself out of a job'. The war winner's authority lasts only as long as the trust remains earned and the rehabilitative task – as defined here by the recipe – keeps progressing in the direction of minimal justice.[43]

What role should the international community play? Both watchdog and junior partner. Watchdog, to ensure that the power enjoyed by the war winner does not corrupt. And junior partner, in that sensible war winners will want to reach out and receive additional resources as well as world-wide expertise in the various fields of social reconstruction. The war winner should not have problems attracting such outside aid *if* the war itself was just. There is, for example, a large international presence in the reconstruction of Afghanistan. Nor should the international community hesitate to provide such aid, since it is not just a matter of charity but also of improving the peace and security of themselves and their own people. The United States, obviously, is having some problems in this connection with Iraq. Non-aid from erstwhile international allies is understandable – not wanting to reward and legitimize what they see as an unjust war. However such allies cannot forget that the Iraqi people pay the price for such non-provision as well. I do not think non-aid violates a duty here but these consequences should still be kept in mind when making a decision whether to help a war winner engage in social reconstruction.

When it comes to UN involvement post-conflict, the UN does have much relevant, and recent, experience – e.g., in East Timor – which it would be wise to draw upon. Is such needed to confer legitimacy upon post-conflict reconstruction? I do not think so: the UN, while seasoned, has had some sour experiences as well, especially in African conflicts ranging from Congo to Somalia to Rwanda. The UN has also recently been involved in serious corruption scandals, so there is no guarantee that multilateralism ensures integrity in the process.[44] The exclusivity of such UN bodies as the Security Council also raises questions regarding its political – as opposed to legal – legitimacy. There is also the probability of success issue. On the one hand, you do want lots of resources, support and diverse expertise; on the other, too many cooks can spoil the broth. Is the Afghani reconstruction – featuring the UN and many countries – going much better than the Iraqi? To those in the know, not obviously so. The Taliban are not in power but still exist, especially in rural Afghanistan; most of the reconstruction is centred only around the capital, Kabul; rival clan lords retain armed militias, posing security threats; and there has been a failure to develop the legitimate economy, driving local farmers to poppy production, which feeds heroin addiction and provides illegal drug lords with resources

[43] ICISS, *supra* n. 33, pp. 44-45; UN Charter, Arts. 73 and 74.

[44] Dobbins, *supra* n. 28; R. Dallaire, *Shake Hands with the Devil* (New York, Carroll & Graf Publishers 2003); K. Cain et al., *Emergency Sex and Other Desperate Measures* (New York, Ebury Press 2003).

and power.[45] Part of this checkered record, of course, is the sheer difficulty of the enterprise – which we should never underestimate – but another part might be that responsibility so widely divided can leave actors with insufficient incentive for ensuring overall success. In my view, fewer people worry about Afghanistan, despite its severe difficulties, because there is larger consensus on the justice of that war and accompanying regime change. Contrast this with the Iraq case, where the whole enterprise substantially rests on the shoulders of the Iraqis and the United States. United States prestige and possibly security are on the line, and the Iraqis have their very futures at stake. This illustrates, for me, that the key relationship in reconstruction always boils down to that between the war winner and the local population: they each bear big burdens, and the involvement of both is essential for enduring, successful reform.

6.2 **Resistance**

We should predict a rough ride, especially at the beginning. Regime hold-outs, fanatics of various stripes, criminal elements and foreign de-stabilizers might all actively resist forcible regime change, even if the initial war was clearly just. Assuming it was so, the war winner is entitled to combat the resistance, and embark on a 'hearts and minds' campaign to win hold-outs over. But if for some reason the resistance genuinely takes on the character of widespread public resistance and uprising to occupation, then careful consideration must be made of what to do next. Fact-finding is here vital: if the resistance is illegitimate – composed of those elements listed above – then it is legitimate to stamp it out, or at least control it through military and police measures. Social reconstruction is hugely difficult – but hugely worthwhile if successful. One cannot just turn tail and run in the face of some car bombings and kidnappings. That would, irresponsibly, create an incentive in favour of violent resistance and be a breach of faith with the interests of the majority of the local population. One also cannot allow the re-birth of a regime failing minimal justice – or else what was the point of the war? But if the resistance becomes deep, patterned and genuinely widespread – involving things like general strikes, commercial and political boycotts, and regular mass protests – then clearly a change of strategy is demanded, almost certainly including a stepped-up transfer of sovereignty. The devil here is truly in the details of the case, and none of us should envy policy-makers who must decide when the resistance is rough but illegitimate, and when it becomes so serious that justice demands a radical policy shift. Much of how the resistance question plays out, in my view, will be affected by perceptions of the justice of the war to begin with. There is simply no escaping the interconnections, here as elsewhere.

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[45] Traub, *supra* n. 34, pp. 32-62.

6.3 **Knowing versus doing**

Al Pierce has noted that there is a difference between knowing what to do, and actually being able to do it. In other words, even if we do know the general recipe for pro-rights reconstruction, there is still the issue of whether we are able to implement that knowledge in particular instances. In Iraq, e.g., there has been quite fierce armed resistance to both American and Iraqi attempts to implement the general recipe there. This does highlight the distance between the ideal and the real, which can never be ignored in international affairs. I agree with the moral logic of Pierce's position but it is hard to state what it finally means for the thesis advocated here. We cannot be overconfident of success; we must expect resistance and impatience; and we must meaningfully involve the local population in the reconstruction of its own regime. But there have been actual cases of successful pro-rights, post-war reconstruction. We think of Germany and Japan post-World War II especially. These cases have even occurred in social contexts – like Japan in 1945 – with no appreciable background commitment to any of the needed attitudes, habits and values. So it can be done; there is no abstract, sweeping 'cannot'. Perhaps it can not be done in particular cases – but how are we to know without trying? Pierce's point is important, and rightly cautionary. But it does not show that post-war rehabilitation should not be tried at all, or that it is misguided in principle. We can still have it as our ideal plan, even if it turns out we can only partially realize it in particular cases.

7. Conclusion

This chapter examined *jus post bellum* from the perspective of just war theory. Historically, the theory has ignored, or over-looked, justice after war. The case was then made for remedying this gap. Positive principles – for both war in general, and for regime change in particular – were then constructed, explained and defended. Some such principles ought to stimulate this exciting new debate on this vitally important topic of *jus post bellum*. I close by advocating once more not just for moral reform in this regard but full-blown legal innovation as well: we need a new Geneva Convention dealing solely with these post-war problems and values. To those who say such will never happen, I reply that such was said about other treaties which eventually did happen (e.g., the human rights ones). And to those who say that such is not needed, I reply that war-winners, war-losers and the international community could all profit from clear standards, guidelines and benchmarks for behaviour in difficult post-war scenarios. It is in all our interests to regulate behaviour in post-war moments, and to channel it in the direction of minimal justice and political legitimacy.

Chapter 3
TWO EMERGING ISSUES OF JUS POST BELLUM: WAR TERMINATION AND THE LIABILITY OF SOLDIERS FOR CRIMES OF AGGRESSION

David Rodin*

Abstract
In this essay I identify and discuss two emerging issues that will be of crucial importance to the development of jus post bellum within a complete and coherent doctrine of just war theory. The first issue concerns the need for a better developed account of the moral and legal considerations governing the termination of war (in contrast to rules governing action after war has terminated). These questions have traditionally been marginal to jus post bellum and, indeed, I argue that there are reasons to consider these issues as a fully independent component of just war theory. The second question concerns liability to post bellum trail and punishment for the ad bellum crimes of aggression. Traditionally such liability has been reserved for only the most senior governmental and military officials. However, drawing on recent scholarship on the connection between jus ad bellum and jus in bello, I argue that there are strong reasons to extend such liability to ordinary line soldiers. This surprising result provides an interesting case study on how ad bellum, in bello and post bellum components of just war theory, interpenetrate each other.

1. The Need for a Theory of Just War Termination

As is well-known, *jus post bellum* is a relatively underdeveloped area of just war theory. Moreover, most of the work that has been done in this area has focused on the rights and responsibilities of victors and vanquished after open hostilities have terminated and peace been restored. Central questions include, what are the obligations of occupying forces? What rights do victors have to change the domestic political and institutional arrangements of vanquished or engage in regime change? Do victors have obligation to assist in economic reconstruction? Do vanquished aggressors have an obligation to compensate the victims of aggression? To what extent ought the perpetrators of an unjust war be tried and punished?[1] These questions are all important and clearly relevant to any ethical theory of war.

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[1] For recent discussions of *jus post bellum* see B. Orend, *The Morality of War* (Peterborough, Broadview Press 2006), Ch. 6-7 ;G. Bass, 'Jus Post Bellum', 32 *Philosophy and Public Affairs* (2004), pp. 384-412.

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But if the set of questions concerning what happens after war exhausts the scope of *jus post bellum* (as the term suggests), then it is clear that even a tripartite just war theory containing *ad bellum*, *in bello* and *post bellum* components in incomplete. What is omitted from this configuration is a moral theory of the ending of war, understood as body of theory whose function is to regulate the transition from fighting to peace and give guidance to combatants on when they are permitted or required to quite hostilities and sue for peace. It is difficult to formulate a neat Latin phrase to describe a theory of just war termination; '*Jus ad terminationem belli*' comes close but is cumbersome. Instead (still keeping a Latin vein) I will refer to *terminatio* law.[2]

These issues may of course be treated under the heading of *jus post bellum*, however to see the logic of separating them into their own body of theory consider the relationship between the *jus ad bellum* and *jus in bello*. *Jus ad bellum* is a moral doctrine that covers the transition from a state of peace to a state of war: crucially it specifies the necessary conditions for transitioning from the one state to the other. *Jus in bello* is a moral doctrine which specifies the rights and obligations of actors once in the state of war. *Terminatio* law stands in the same relationship to *jus post bellum* as *jus ad bellum* stands to *jus in bello*. Whereas *jus post bellum* is most naturally interpreted as governing the rights and obligations of actors once they have transitioned from a state of war into a state of peace, *terminatio law* governs the transition itself.

I thus envision a quartet of considerations which together give a complete account of the moral obligations of combatants through the cycle of violence: the transition from peace to war (*jus ad bellum*), the obligation of combatants in war (*jus in bello*), the transition from war back to peace (*terminatio law*), and the obligations of combatants after war (*jus post bellum*).

If one looks at traditional and contemporary just war writing one will find very little attention to the issue of the transition from war to peace, and certainly no articulated doctrine of *terminatio law*. Why has such scant attention been paid to war termination? It may be because of an image of war prevalent, for example, in the writings of Michael Walzer which sees war, especially just wars of defence, as governed by a strong form of necessity.[3] The aggressor compels us to fight for our rights and we have no choice but to respond, either vindicating our rights with victory, or succumbing in defeat. But historians often emphasize that there is a quasi-consensual aspect to all war. Wars only continue as long as both sides feel that they have more to gain by fighting than by suing for peace. On this understanding there are subtle and complex choices to be made about when and how one ought to end open hostilities and transition to peace that are at least as complex and morally important as the decision to resort to war in the first place. If just war theory is to be a complete, and to give these issues the attention they deserve then it must

[2] I take this term to cover both moral and strictly legal issues concerning the termination of conflict.

[3] See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn. (New York, Basic Books 2000); Orend, *supra* n. 1, p. 162.

provide a set of moral, and perhaps legal guidelines to cover this important phase of conflict.

It might be objected that no independent theory of *terminatio* law is required because the termination of war is simply the symmetrical inverse of the initiation of war and therefore can be governed by precisely the same *ad bellum* conditions that govern war's initiation. This view is given plausibility if one accepts that just war theory contains a strong presumption against war, with *jus ad bellum* articulating sufficient and necessary conditions for defeating this presumption. It might then appear that a full account of *terminatio law* simply consists in the continuous application of *jus ad bellum* principles throughout the course of a war. If at any point during a conflict one or more of the necessary conditions for a just war ceases to be met, then continuing with the war is no longer just and the combatant is morally obliged to cease hostilities (we may assume that the side that had no just cause to begin with is obligated to desist throughout the conflict).

There is some truth in the idea that the *jus ad bellum* conditions will be relevant to the question of when and how to end war. As Brian Orend and others have emphasized, *jus ad bellum* plays a significant role in all other areas of just war theory a war that was not justified *ad bellum* cannot fully satisfy the conditions of *jus post bellum*.[4] In the second section of this chapter I will argue that there is an equally compelling relationship between *jus ad bellum* and *jus in bello*, so that acts performed in the course of an unjust war are themselves unjustified and should attract liability to punishment. An obvious point of connection between the criteria of *jus ad bellum* and the case of *terminatio* law is the necessity condition. It seems plausible that if it ever becomes apparent in the course of hostilities that continuing with the war is no longer necessary for a combatant to achieve its war aims, then it morally ought to stand down and pursue the non-violent means.

Yet the assumption that a full specification of *terminatio* law simply consists in the continuous application of *jus ad bellum* throughout a conflict is, at the very least, a significant simplification. Consider, for example, the *ad bellum* condition of proportionality. Suppose a state has suffered an act of aggression and lost a tract of territory to the enemy. It estimates that it can liberate the territory with the loss of 1000 lives, a cost it rightly deems proportionate to its just war aim. Suppose now that the initial phase of the campaign goes well and that 80% of the territory is recovered with the loss of just 200 lives. If the condition of proportionality must be applied continuously throughout the campaign, then it may be that regaining the remaining territory at a cost of 800 lives is no longer deemed proportionate. And yet *ex hyposethi* the campaign as a whole, including the regaining the last 20% was deemed to be proportionate.

This difficulty could be overcome by making the proportionality comparison at the outset of hostilities the definitive baseline to be employed throughout the conflict. But if so then a converse problem arises. Imagine now that the campaign to regain the territory starts badly with the loss of 800 lives and the gain of negli-

[4] Orend, *supra* n. 1, at p. 162.

gible territory. At this point in the campaign a reasonable assessment might be that to liberate the lost territory will involve the loss of 500 additional lives. A casualty assessment of 1300 would have rendered the campaign disproportionate prior to the war. But at this juncture the 800 dead are, to use an accounting metaphor, a 'sunk cost'. If it is proportionate to initiate a campaign of 1000 casualties to recover the land, then it is seems paradoxical to prohibit the continuation of a campaign that would recover the same land with 500 additional casualties.

These two examples suggest that if proportionality plays a role in determining when it is just to terminate a war (as surely it must) then we must employ a richer and more complex understanding of the condition specifically tailored to the case of war termination. These examples also point to a tension, which I will explore below, between the *ad bellum* perspective of assessment before the conflict starts, and the much more dynamic and fluid perspective of assessment during the conflict itself. I will argue that if *terminatio* law is to be fully adequate it must find a way to balance and combine these two different perspectives.

2. The Scope of Bellum Terminatio Law

In this section, I will not offer a full theory of *terminatio* law, but simply attempt to indicate its scope, some of the motivating considerations, and certain of the central questions it will need to address.

In general it is helpful to think of a theory of *terminatio l*aw covering four sets of questions corresponding to the three likely outcomes of war: victory, defeat, stalemate, and intervention by a third party. In each of these cases consideration will need to be paid to how the *jus ad bellum* criteria apply to war's termination, and whether they require reinterpretation, modification or supplementing.

Two competing considerations will shape our understanding of the different components of *terminatio* law. The first is the way that war aims evolve as a conflict progresses. This consideration will tend to have an expansive effect on *terminatio* law, creating many opportunities to expand the moral permission to continue fighting, sometimes far beyond what could have be countenanced by application of *ad bellum* principles at the conflict's start. The second is the need to manage the constant risk of escalation in war, which will require a more restrictive approach to *terminatio law*. It is worth developing these two competing considerations in further detail.

Before the commencement of a conflict, *ad bellum* issues of proportionality, necessity and reasonable prospect of success are judged against a fixed set of war aims that must conform to the strict requirements of just cause. Yet as soon as conflict commences, war aims inevitably start to shift, mutate and frequently to expand; providing opportunities to continue fighting a war beyond the point that would have been endorsed if considered exclusively from the *ad bellum* perspective. This shift in the nature and quality of war aims will particularly affect the way we apply conditions of proportionality, reasonably prospect of success and just cause to termination questions through the course of a conflict.

Consider some of the ways in which this may occur. First, as soon as a war has started, more is typically at stake than simply the achievement or failure to achieve the aims contained in the just cause. For losing a war is characteristically a significant harm in itself, involving, at the very least, a loss of credibility, prestige, and military capacity. Typically the consequences of fighting and losing a war are worse than not fighting in the first place. Avoiding the harms entailed by military defeat, therefore, immediately functions as an additional war aim, thereby supplementing the goods contained within the just cause for the purposes of proportionality judgment. In this way the moral presumption in favour of remaining at war can be considerably stronger than the reasons for going to war in the first place.

Of course the consequences of defeat can vary enormously, and these differences will be morally significant. For an advanced western state conducting a 'war of choice' in a distant foreign land the costs of defeat will be far less sense than for a state that fights on its own territory and faces occupation by a foreign power. Similarly defeat by a disciplined army with limited war aims will entail fewer costs and dangers than defeat by an ill-disciplined army or one fired by political, racial or ethnic ideology, or one set on regime change and political transformation. But in all cases defeat has a cost, and this cost must be factored in to any account of *terminatio* principles.

Second, war aims may expand in the course of a war because the enemy has committed atrocities or other violations of the laws of war. Resisting, and ultimately punishing, such war crimes is normally thought to form an additional just cause for military action and it can therefore strengthen the presumption of proportionality for a given war or military campaign. As Jeff McMahan points out even an army fighting a war which is *ad bellum* unjust can gain a limited justification for fighting, if they are resisting action by the just side which violates the rules of *jus in bello*.[5] An element of just cause can therefore proliferate to both sides of a conflict with a corresponding expansion of the scope to continue fighting.

Third, new information frequently comes to light in the course of a conflict which may alter our assessment of both proportionality and just cause. The second example considered in the previous section concerned how to deal with new information about the likely duration and costs within proportionality judgments. I suggested that we apply the accounting methodology of discounting 'sunk costs' and effectively treating all new information about forward looking campaign costs as a new opportunity to recalculate proportionality. This principle will obviously have a very permissive effect, allowing parties to extend a campaign to levels of destructiveness that would never be permitted prior to the conflict commencing.

New information can also be directly relevant to the strength or viability of the just cause itself. Sometimes this new information may undermine the presumption of a just cause (as the failure to discover weapons of mass destruction undermined the claim of just cause in the 2003 Iraq war). In other cases new information may reinforce and strengthen the initial just cause (as the discovery of the true extent of Nazi genocide did for the Allies in WW II).

[5] See J. McMahan, 'The Ethics of Killing in War', *Ethics* (July 2004), pp. 693-733, 712 et seq.

Fourth, it is possible that the violation of the *terminatio* law itself may function as a subsidiary cause for war. If for example, an army with a just cause remains at war after achieving its just goals, and pushes to achieve unjustified war aims, then this may justify the initially unjust side in remaining at war to resist this action. And of course, if an unjust combatant refuses to cease hostilities when reasonable opportunities for surrender or negotiation are presented, this violation of *terminatio* law will add to the just sides moral reasons for fighting, once again extending the opportunities for proportionate conflict to be sustained and expanded.

In all of these cases the self-sustaining and escalating nature of war is clearly evident. What is interesting is that the process of escalation in war, long understood by strategists and historians, is manifest also at the ethical level. Once a war has commenced it is often easier to justify remaining at war because the scope and importance of war aims can expand significantly during a conflict. This morally permissive effect follows from applying *jus ad bellum* principles to the question of war termination.

But the tendency to escalation in war is itself an extremely important factor which must be addressed in any theory of *terminatio* law. The theory must guard against sanctioning a prolongation and intensification of conflict which may have started with limited aims, but which might escalate in extreme cases towards total war. This suggests that even if the continuous application of *ad bellum* principles (with appropriate modifications) is relevant to *terminatio* law, it cannot on its own provide a full and sufficient account. The *ad bellum* principles must be supplemented with additional norms and principles designed to lessen the tendency of escalation. How might one approach the formulation of such norms and principles?

Most obviously one could modify how the *ad bellum* conditions are applied within the *jus ad bellum* itself. To carry the accounting metaphor a stage further, one could insist that a 'contingency' be added to the assessment of projected harms within the *ad bellum* proportionality judgment. The purpose of this contingency would be to make appropriate provision for the likely inflation of war aims and costs – the additional exposure to harm by defeat, potential *in bello* or *terminatio* violations committed by the other side, and the risks posed by the discovery of new information and overly optimistic assessments of war costs. The contingency would work by raising the threshold for going to war and thereby reduce the likelihood of limited wars escalating beyond the point at which they could have been justified pre-*bellum*.

Once war has already started there must be rule-governed mechanisms for impeding the forces of escalation and providing opportunities to move towards conflict termination. I will do no more here than indicate some of the key issues that will require significant further development. Obviously strict application of *jus in bello* is crucial to managing the risks of escalation. Since *jus in bello* is largely enforced by the combatants themselves during the course of a conflict, this will require restraint also by the side that has suffered injury, to ensure that reprisals do not trigger a further round of escalation and abuse. Second, careful thought must given to the viability of the 'sunk cost' interpretation of proportionality in *terminatio*

law. This way of treating *terminatio* proportionality essentially hands a blank cheque to combatants to continue a war on revised assessments of its future costliness. It is vulnerable to abuse by a psychology of optimism that constantly believes a hopeless war can be won with 'one more push'. Such tendency has clearly been present in the modern day conflicts of Vietnam and the Second American war against Iraq. At the very least, both domestic and international institutions must find ways of responding to inaccurate *ad bellum* cost assessments which result in long and destructive wars. Within democracies, the legislative body may be able to place limits on the power of the executive to extend a war when the executive has shown that it wildly underestimated the costs of a war. At all times both sides ought to pursue opportunities for conflict resolution including negotiation, mediation, and temporary cease fires. All must be supported by continuous and active communication.

I indicated above that the two competing considerations of managing escalation and responding to changing conditions through a conflict will need to be applied to a set of more specific questions appropriate to the different ways that wars can end. We must investigate the different rights and obligations of those facing defeat, those approaching victory, those in a situation of stalemate, and those contemplating intervention to end a war between others. I offer here the briefest survey of questions and issues, which must stand in for a fuller treatment at a later stage.

When ought a disadvantaged combatant to cease hostilities and surrender? Two theoretical issues will be important. The first is how we are to think of reasonable prospect of success. A combatant on the brink of defeat may have no prospect of achieving their initial war aims, even if they constituted a just cause. Does this mean that continuing to fight is thereby rendered unjust? Not necessarily, because as we have seen above, what is likely to be of most relevance, in this context, is the goal of avoiding or mitigating the catastrophe of defeat. It is against this goal that reasonable prospect of success and proportionality in must be judged for *terminatio* purposes.

The questions here will require fine grained judgment and much will depend on the military and political context of the case. What can reasonably be hoped to be achieved by continued fighting? Will continuing improve bargaining power at surrender negotiations? Will it do so enough to justify the costs of additional fighting? What are the prospects of relief from allies or international agencies? On the other hand, would continuing to fight merely inflame the victor, increasing the risk of harsh treatment and potential abuse or massacre? All of these questions will be relevant to the issue of when a disadvantaged combatant is permitted or required to surrender a losing war.

Of relevance too will the privations that can be expected to follow from defeat. Western powers today typically fight wars in distant countries, and have no risk of enemy occupation even if they suffer a military failure. But things are very different if one is fighting on ones home territory and the price of defeat is occupation. Even when the occupying power is a democracy, committed to reconstruction and democratic governance, occupation can bring with it immense disruption and

considerable injustice, as Iraq's experience under the coalition has shown. At the extreme end of the scale defeat and occupation may lead to subjection to a dictatorial regime, slavery, or even genocide. The right to continue resisting and the obligation to surrender will be very different in each of these cases.

A second key set of questions revolve around the issue of proper authority. *Jus ad bellum* insists that a war may only be declared by a properly authorized body, normally the sovereign. But does this mean that soldiers are obligated to cease fighting when the sovereign authority is captured, destroyed or surrenders to the enemy? Unlike most other *terminatio* issues there is a considerable body of contemporary and historical jurisprudence on this question. Scholars have tended to assume that an act of surrender by the legitimate authorities of a state is binding on all combatants, and those who continue to resist do so without justification. A potential exception to this is the case of *levee en masse*, a spontaneous uprising by the population against an occupying power.[6] The assumption that surrender agreements morally preclude further resistance has also come under scrutiny after the experience of the French resistance to Nazi occupation during WW II.

What are the moral constraints governing the termination of war in victory. The central issue here involves determining when to stop in the prosecution of a just cause. It might seem that the answer is self-evidently provided by the terms of *jus ad bellum*: victory should be declared when the conditions that constitute the just cause for war are met. In reality there are fine judgment calls to be made here. Jeff McMahan and Robert McKim distinguishes between two forms of just cause.[7] Sufficient just causes such as self-defense against aggression and humanitarian intervention are such that they are able to satisfy on their own *ad bellum* condition of just cause. Contributing just causes are not themselves sufficient to ground the initiation of a war, but they are appropriate war aims which can contribute to a wars justice given the presence of a sufficient just cause. Contributing just causes may include such aims as deterring future aggression, punishing those responsible for the initiation of aggression, degrading enemy forces and disarming the enemy to make future acts of aggression less likely. Yet determining where these potentially legitimate aims end and inappropriate war aims that constitute a form of aggression

I conclude this section by indicating two areas which will require more attention than they have so far received. The first issue concerns how to regulate the termination of wars that seem likely to end neither in clear defeat or clear victory, but instead drag on into a prolonged stalemate. Military stalemate is often associated with wars of attrition and WW I certainly demonstrated the devastation this type of war can cause. But in the early 21st century we are perhaps seeing the dominance of a new kind of military stalemate, arising from asymmetric conflicts between advanced states and various non-state actors such as guerrillas, terrorists, and international criminal networks. The asymmetric conflict between Israel and

[6] For a discussion of legal and historical issues relating to *levee en masse* see K. Nabulsi, *Traditions of War, Occupation, Resistance and the Law* (Oxford, Oxford University Press 1999).

[7] J. McMahan and R. McKim, 'The Just War and the Gulf War', 23 *Canadian Journal of Philosophy* (1993), pp. 501-541.

the Palestinians has raged for over fifty years and though each side has demonstrated an ability to inflict grievous harm on the other, neither side seems capable of decisively achieving its long-term strategic goals. It would not be surprising if the US-lead 'war on terror' were to follow a similar trajectory over the coming decades.

A focus on the just causes that may have lead combatants to war is unlikely to be helpful in addressing the issue of how justly to terminate a war that has descended into stalemate. Tools from the field of conflict resolution will clearly be of more use. We must try to articulate criteria that enable adversaries to recognize when they are in a situation of hopeless stalemate and provide incentives for combatants to make the painful compromises necessary for peace. These compromises entailed will often be painful and troubling also from a moral perspective. They may entail foregoing the vindication of victims' rights, or the appropriate punishment of perpetrators in order to end a period of hostilities whose costs have become too high. International agencies, particularly the UN, and the broader international community will have a crucial role to play in this and the rights and the rights and obligations of these external actors must therefore form an integral part of this component of *terminatio* law.

The final means by which war may be terminated is through the external intervention of a third party. At this point *terminatio* law intersects with the body of legal and philosophical work on humanitarian intervention. The Responsibility to Protect report by the International Commission on Intervention and State Sovereignty helpfully lays out a model for assessing the obligations of both potential agents and subjects of intervention. It attributes a primary responsibility to states to protect and not to violate the rights of their citizens. If states fail in this responsibility, then a secondary responsibility is triggered in international agencies and foreign states to protect the rights of those citizens – by military intervention if necessary in extreme cases.[8] Although the Responsibility to Protect doctrine was not specifically formulated as a model of war termination, it is clearly applicable to issues of *terminatio* law when, for example, a state is engaged in a genocidal campaign against part of its population, or two combatants persist with an un-winnable war that seriously endangers the rights of large numbers of civilians. It is true that there is diminishing appetite among the international community to engage in 'peace-making' interventions. Nonetheless we must remember that intervention need not be thought of exclusively in military terms. It may also include primarily diplomatic interventions, as with the US engagement that lead to the Dayton accords to end the Bosnian war. Moreover military intervention has sometimes been used successfully to disrupt conflicts as in the UK intervention in Sierra Leone.

In this part of the chapter I have investigated moral rules governing the termination of conflict. I suggested that there are reasons for considering this ques-

[8] On the Responsibility to Protect see D. Rodin, 'The Responsibility to Protect and the Logic of Rights', in O. Jütersonke and K. Krause (eds.), *From Rights to Responsibilities: Rethinking Interventions for Humanitarian Purposes,* PSIS Special Study 7 (Geneva, Programme for Strategic and International Security Studies 2006).

tion as a fully independent element of the just war theory alongside *ad bellum*, *in bello* and *post bellum*. *Terminatio* law has received less attention even than the mainstream questions of *jus post bellum*. It is subject to significant tension between an expansive permission to continue fighting which arises from applying *ad bellum* criteria through the course of a conflict and a more restrictive requirement arising from the need to manage the forces of escalation in conflict. These high level considerations will need to be worked through a specific set of rules governing the termination of war in defeat, victory, stalemate and intervention.

3. Post Bellum Justice: The Liability of Soldiers for Ad Bellum Crimes

I now turn to an issue that lies squarely within the boundaries of *post bellum*. Punishing those responsible for war crimes has always been considered a potential component of *post bellum* justice. Since the Nuremberg trails at the end of WW II an attempt has been made to punish those responsible for the *ad bellum* crime of aggression. Yet the vast majority of the agents involved in perpetrating the crime of aggression – the individual officers and soldiers who fight in aggressive wars – are never held to account either in law or in broader moral terms. This 'liability gap' is one of the great puzzles of international law and international ethics, and it poses an important challenge for any account of *jus post bellum*.

According to traditional just war theory and current international law the *in bello* rights and obligations of combatants apply equally to opposing sides of a war (the 'symmetry thesis'). Similarly, the *ad bellum* status of a combatant's cause does not affect his *in bello* rights and obligations (the 'independence thesis'). Together these two theses imply that ordinary soldiers who participate in an unjust war do no wrong so long as they do not violate the norms of *jus in bello*. This is certainly a 'common sense' understanding of the status of soldiers at war; most of those who criticized the 2003 invasion of Iraq as an unjust war, did not believe that ordinary soldiers who fought there were war criminals, simply for fighting.

But both claims have recently been subject to important theoretical criticisms. These criticisms derive from a variety of different considerations which are interrelated on a number of different levels, but the most important arguments seem to me to concern four main ideas: the role of self-defense in the justification of war, the nature of responsibility and excuse, the proper interpretation of *in bello* proportionality, and consequentialism. I will briefly review these four lines of argument and then suggest that they are correct – but only in part. I conclude that these arguments compel us to think seriously about extending *post bellum* liability for crimes of aggression beyond heads of state to include common soldiers and mid-ranking officers.[9]

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[9] The follow sections draw from D. Rodin, 'Why Jus In Bello Asymmetry is Half Right', in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors, the Moral and Legal Status of Combatants* (Oxford, Oxford University Press, forthcoming).

3.1 The self-defense argument

Self-defense is today the single most important legal and ethical justification for war.[10] Although I have recently tried to raise doubts about the ability of self-defense to justify wars not authorized by a legitimate global authority, self-defense remains the dominant paradigm of justified war both within legal and ethical thought.[11]

The problem is that if justified acts of war are instances of self or other-defence this seems to entail the rejection of the symmetry and independence theses. This is because, unlike the broader conception of self-preservation, a right of justifiable self-defense contains limitations on the permissible objects of defensive force. Legitimate defensive force may only be directed against persons who are morally or legally liable to it. Traditional just war theory has attempted to explain the liability to force through a morally neutral specification of non-innocence: soldiers at war are liable to force because they are engaged in a harmful activity (*noccentes* the Latin root of the modern word innocent means harmful).[12] But this account of liability is demonstrably false. It is not permissible to use force against a person engaged in a harmful activity that is itself justified. Thus one is permitted to kill in defence an unjustified aggressor, but one is not permitted to kill a wholly innocent bystander, or a justified attacker such as police officer using lawful force in the course of his duties or indeed a victim of aggression who is using lethal force in legitimate self-defense. The use of force in self-defense is only justifiable as a necessary and proportionate response to an *unjustified* threat.[13]

But of course, according to just war theory, a soldier who is fighting in a justified war of defence and is abiding by the rules of *jus in bello* is precisely such a justified user of force: he is not engaged in unjustified harming, threatening, or attacking of any other person or their legitimate interests. Soldiers fighting in a just war therefore seem to lack liability for force being used against them. It would seem to follow that while soldiers fighting in a just war are permitted to use force

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[10] It is currently the only unambiguously recognized legal justification for war in the absence of Security Council authorization. See Charter of the United Nations, Art. 51. In the last few decades a tentative norm permitting humanitarian intervention to prevent massive violations of basic human rights by a state against its own people has emerged. But this too can be seen as reflecting the implicit logic of self-defense if one views the defensive rights justifying war as belonging in the first instance to individual citizens rather than states. Humanitarian intervention can then be understood as analogous to the defence of third parties from unjust attack. This logic was clearly reflected in the *Responsibility to Protect* doctrine.

[11] D. Rodin, *War and Self-Defense* (Oxford, Oxford University Press 2002), Part II.

[12] See G.E.M Anscombe., 'War and Murder', Ch. 6 in her *Ethics, Religion and Politics,* Vol. 3 of *The Collected Philosophical Papers of G.E.M. Anscombe* (Oxford, Basil Blackwell 1981), pp. 51-61 (essay first published in 1961); G.E.M Anscombe., 'Mr Truman's Degree', Ch. 7 in her *Ethics, Religion and Politics,* Vol. 3 of *The Collected Philosophical Papers of G.E.M. Anscombe* (Oxford, Basil Blackwell 1981), pp. 62-71 (essay first published in 1957).

[13] For a stronger view according to which liability to defensive force requires a degree of responsibility for the unjustified act see Rodin*, supra* n. 11, Ch. 4. Jeff McMahan defends a slightly different variant of this claim in McMahan, *supra* n. 5, pp. 693-733, pp. 718-722.

against the enemy, soldiers fighting in an unjust war are not. Soldiers fighting in an unjust war do not enjoy a symmetrical privilege to kill and presumptively should be held responsible for unjust killing after the conflict.

The philosopher who has perhaps done most to develop this line of argument is Jeff McMahan. McMahan's account is premised on a very strident example of what I call in War and Self-Defense the 'reductive' account of war. That is to say he attempts to provide an explanatory account of war which reduces the rights and responsibilities of combatants at war entirely to the rights and responsibilities of individual persons. As he says '… justified warfare just *is* the collective exercise of individual rights of self and other-defence in a coordinated manner against a collective threat.'[14] This reductive account is quite radical, and has revisionary implications in many areas of the ethics of war. But the self-defense problem arises for any view of war which sees self-defense as the primary locus of the justification for the violence of war, and which holds that the tenets of normal interpersonal morality remain relevant to individuals at war. Even if one holds that normative relations in war are necessarily mediated through super-personal entities such as the state or nation, one must still explain why individual soldiers in war no longer posses their ordinary human right not to be killed. The problem with using the concept of self-defense in providing this explanation is that the liberty of self-defense is inherently and necessarily asymmetrical: identifying a class of justified defensive actors seems to logically entail identifying a class of unjustified actors. The argument from self-defense thus constitutes a significant challenge to the presumption that soldiers enjoy a symmetrical right to kill the enemy.

3.2 The responsibility argument

An obvious response to the self-defense argument is to concede that soldiers fighting in an unjust war are not justified in using force against the enemy, but to claim that they are nonetheless excused. The symmetry thesis is false at the level of justification (only soldiers fighting in a just war are truly justified in their use of violence), but it is true at the level of culpability and impunity (soldiers on neither side are culpable and they are immune from blame and punishment – soldiers on the just side because their use of force is justified; soldiers on the unjust side because they are excused). This conclusion is something less than Michael Walzer's canonical 'equal right to kill',[15] for the excused unjust soldiers do not possess a liberty or permission to kill, but it does ground a significant and wide-ranging impunity from blame and punishment for soldiers on both sides of a conflict.

Why might one think that soldiers fighting in an unjust war are excused of culpable use of force? The most common suggestions are that unjust soldiers are excused by reason of duress or of non-culpable ignorance. The problem is that these claims do not cohere with our normal standards of liability in criminal law

[14] McMahan, *supra* n. 5, pp. 693-733, p. 717.
[15] See M. Walzer, *Just and Unjust Wars* (New York, Basic Books 1977), p. 41.

and inter-personal ethics.[16] Although soldiers at war do face tremendous coercive pressures of various kinds, in many cases this pressure falls short of the threat of execution for those who refuse to fight. Even in cases in which a soldier faces death if he does not fight, this may not furnish an excuse for wrongful killing because duress has not traditionally been recognized as an excuse for wrongful homicide in most jurisdictions. In domestic society we expect a person to prefer death rather than commit wrongful killing. David Mapel makes the interesting further point that fear of death (cowardice) is not recognized as an excuse for dereliction of duty in war, so it is unclear why fear of death should be recognized for the presumably more stringent requirement not to engage in wrongful killing.[17] Furthermore, even if we were to recognize the coercive measures of military discipline as sufficient to excuse wrongful killing in war, this would not necessarily establish the innocence of soldiers who kill in an unjust war. The excuse may be only partial, leaving substantial room for criminal liability. Moreover unjust soldiers could still be liable if they volunteered or allowed themselves to be drafted in circumstances in which there was a reasonable likelihood they would be required to engage in wrongful killing (in the same way that someone who wrongfully kills while voluntarily intoxicated can be held liable, not because he is responsible for the killing, but because he is responsible for becoming intoxicated when this can reasonably be foreseen to lead to wrongdoing).

Similar problems arise with the suggestion that wrongful killing in war may be excused by reason of ignorance. While it is true that military commanders and government officials restrict access to relevant information and routinely engage in outright deception of soldiers and citizens, there often exist other channels of relevant information – at least within democratic societies with an active free press. Indeed a source of embarrassment to the proponent of the excuse response is that both the duress and the ignorance excuses seem more plausible for soldiers of authoritarian states than they do for those of democratic states. This leaves open the possibility that soldiers of authoritarian states may enjoy the privilege of impunity for killing in an unjust war, whereas those of democratic states do not, thus suggesting yet another way in which the norms of *jus in bello* can apply asymmetrically.[18] But even within non-democratic societies, access to relevant information is at least increasing with technologies such as the internet and this may be sufficient to a morally reflective person to make a reasonable assessment of the justice of war.

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[16] I develop this argument in D. Rodin, *War and Self-Defense* (Oxford, Oxford University Press 2002), pp. 165-173. For a nuanced and slightly more sympathetic discussion see D. Mapel, 'Coerced Moral Agents? Individual Responsibility for Military Service', 6 *Journal of Political Philosophy* (1998), pp. 171-189.

[17] See Mapel, *supra* n. 16, pp. 171-189, p. 178.

[18] Interestingly David Estlund suggests precisely the opposite conclusion in his analysis of the moral status of soldiers in unjust war. Focusing on considerations of epistemic reasonableness he suggest that only soldiers whose state has engaged in the appropriate form of democratic deliberation can avoid moral censure for fighting in an unjust war. See D. Estlund, 'On Following Orders in an Unjust War', 15 *Journal of Political Philosophy* (2007), pp. 213-234.

Francisco de Vitoria argued that ordinary soldiers are not obligated to investigate the justness of the wars in which they fight, but that they should not fight if they happen to discover that their war is not just.[19] But such a position inverts the ordinary burdens of evidence in the most remarkable way. In a normal case of self-defense we prohibit the killing of other persons unless there is clear and compelling evidence that they are about to engage in an unjust attack; we do not permit the killing of other persons unless there is clear and compelling evidence that they are *not engaged* in an unjust attack.

In any case, the excuse response can be nothing more than a stop-gap in the argument. Even if some, or even the majority, of soldiers in an unjust war are innocent of wrongdoing by reason of excuse, it is highly implausible to suppose that all soldiers will be excused in all wars. If one believes that wrongful killing is a serious crime, this seems to entail advocating some kind of judicial investigation of particular cases with the possibility of criminal sanctions. As Robert Nozick aptly put it 'some bucks stop with each of us; and we reject the morally elitist view that some soldiers cannot be expected to think for themselves.'[20]

3.3 The proportionality argument

One of the most interesting arguments against the symmetry and independence theses is the argument from proportionality. The great difficulty with *in bello* proportionality is how to interpret the comparative value judgment that this norm requires us to make. In just war theory the norm has generally been taken to require that the collateral costs to non-combatants of a particular military action not be disproportionate to its expected military utility. In legal terms the norm prohibits any attack 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' (Protocol Additional to the Geneva Conventions (Protocol 1))

But how are we to balance the value of obtaining a certain degree of military utility against the disvalue of harm to non-combatants? It seems clear that obtaining 'concrete and direct military advantage' (for example capturing a bridge or halting the enemy's advance) has no intrinsic moral value, but obtains what value it has instrumentally from the broader project of which it is a part. This seems to imply that the value of achieving a military objective is determined by the *ad bellum* justice of the conflict of which it is a part: it is only a moral value to achieve a determinate military advantage if the war of which it is a part is itself morally just. If the war is unjust, then achieving a military outcome advantageous to its end is a moral disvalue. This in turn suggests an asymmetric and dependent interpretation of *jus in bello*: those fighting a just war may inflict harm (including foreseen but

[19] F. Vitoria, *De Indis Relectio Posterior, Sive de Jure Belle [On the Law of War]*, in A. Pagden and J. Lawrence (eds.), *Vitoria: Political Writings* (Cambridge, Cambridge University Press 1991), 2.2 §22 and §25. Walzer is reluctant to grant even this weak exception, see Walzer, *supra* n. 15, p. 39.

[20] See R. Nozick, *Anarchy, State, and Utopia* (Oxford, Blackwell 1974), p. 100.

unintended harm on non-combatants) to a level which is a function of the goodness of their cause and the contribution a given military action makes to the cause. But those fighting an unjust war may not inflict any harm on combatants or non-combatants, for (their cause being unjust) there is no good which could render the harmful effects proportionate.[21]

The proportionality argument also suggests that soldiers fighting in a just war may enjoy increased *in bello* privileges compared to those currently granted by *jus in bello*. An action yielding a given quantum of military advantage, might justify different levels of collateral harm depending on the contextual justice of its cause. A combatant fighting a war of exceptional justness and importance, might, on this view, possess exceptional permissions to inflict high levels of collateral harm on non-combatants. Thus this argument, as well as suggesting the reduction or removal of the combat privileges of unjust combatants, suggests an augmenting of the privileges (or reduction of prohibitions) for just combatants.

3.4 **The consequentialist argument**

The proportionality norm involves comparing harms and benefits within the constraints of a deontological prohibition on the intentional harming of non-combatants. The consequentialist argument extends the reasoning of the proportionality argument to all acts of war. If the aims of a particular war are just and important, then from a consequentialist perspective it is mysterious why the just combatants should be bound by any *in bello* prohibitions at all if the risk-adjusted expected outcome of violating them is morally preferable to the risk-adjusted outcome of not violating them. Similarly it is mysterious why the unjust combatants should possess any *in bello* privileges. For such privileges help to bring about the fulfillment of unjust war aims, which are *ex hypothesi* a moral evil.[22]

Although not a thoroughgoing consequentialist argument, a variant of this idea seems to underlie the logic of Walzer's supreme emergency argument. According to Walzer (and John Rawls who follows Walzer's argument in *the Law of Peoples*) a community is permitted to violate the most basic *in bello* norms if doing so will enable it to avoid destruction at the hands of a military aggressor.[23]

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[21] Variants of this argument are discussed by Thomas Hurka and Jeff McMahan. McMahan argues that the general claim that military acts of an unjust soldier can never fulfill the proportionality requirement must be qualified. The reason for this is that military actions by a soldier fighting an unjust war can be proportionate if it is directed solely against wrongful acts of soldiers of the just side (for example action that is itself disproportionate, or is in pursuit of unjust aims within an otherwise just war). But as he himself notes this kind of case is 'anomalous' (715) and its impact on the general anti-symmetry argument will be negligible. See McMahan, *supra* n. 5, pp. 693-733, p. 704 et seq.; T. Hurka, 'Proportionality in the Morality of War', 33 *Philosophy and Public Affairs* (2004), pp. 34-65, 45.

[22] Obviously thoroughgoing consequentialists would provide a very different account of the *jus ad bellum* itself, to that found in traditional Just War Theory.

[23] See Walzer, *supra* n. 15, Ch. 16; J. Rawls, *The Law of Peoples* (Cambridge, Massachusetts, Harvard University Press 1999), pp. 98-99.

4. Two Forms of Asymmetry

These four arguments, which I have presented here only in very schematic form, seem to me to form the core of the case against symmetry and independence. I would now like to make a number of observations about this discussion. The first is that while there is only one way to formulate the symmetry thesis there are two different forms of asymmetry which may yield numerous distinguishable formulations of the asymmetry theses. To see this consider the following diagrammatic representation of *jus in bello* norms.

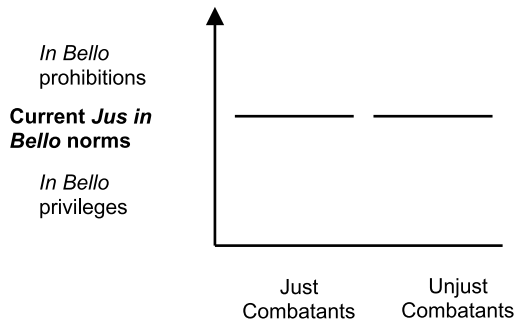

Figure 1

The current *in bello* norms are represented here by two equal lines at the centre of the diagram. These norms create both privileges and prohibitions. Thus action that falls into the zone above the line is prohibited (broadly this consists in the intentional harming of non-combatants, the un-necessary harming of combatants, and the disproportionate or un-necessary un-intentional harming of non-combatants). Military action that falls into the zone below the line is privileged (broadly this consists of the intentional harming of combatants and the proportionate and necessary un-intentional harming of non-combatants). We might understand the privilege in two different ways. It might consist of a justification for action that falls below the line, or it might simply consist of an excuse leading to impunity from moral blame or legal punishment.

There are, however, several distinguishable ways in which we could formulate an asymmetry thesis. We could deny *in bello* privileges to the unjust side or we could grant superior *in bello* privileges to the just side, or we could do both, as shown in Figure 2.

I shall refer to the claim that just combatants have increased *in bello* privileges compared to the current interpretation of *jus in bello* as 'permissive asymmetry' and I shall refer to the claim that unjust combatants have reduced or no *in bello* privileges as 'restrictive asymmetry'. As with the symmetry thesis we may distinguish between *in bello* privileges that amount to a justification and privileges that amount only to an excuse leading to impunity from moral blame and legal punishment.

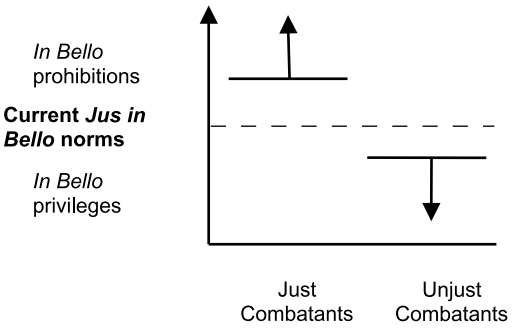

Figure 2

Clearly there is no logical or conceptual reason why permissive and restrictive asymmetry should be asserted or denied together. Indeed the two forms of asymmetry are suggested in different way by the four arguments discussed above. The self-defense argument and the responsibility argument suggest that soldiers fighting in an unjust war should not be granted the *in bello* privilege of impunible killing. But these arguments do not suggest (so I argued) that just combatants should enjoy increased *in bello* privileges. On the other hand, the proportionality argument and the consequentialist arguments support both increased privileges for the just and reduced or eliminated bellow the line privileges for the unjust.

With the distinction between permissive and restrictive asymmetry in place, how should we respond to the arguments against the symmetry and independence theses? It must be accepted at the outset that both the claims of permissive and the below line asymmetry strike many people as deeply implausible and they certainly contradict the mainstream of just war theory and international legal theory. On the other hand the four arguments against asymmetry have some *prima facie* plausibility. My own view is that each of the four arguments (with the exception of the final consequentialist argument which I will deal with separately below) contains an important truth. The symmetry thesis should be rejected, but the doctrine of asymmetry is only half right. Specifically, my hypothesis is that permissive asymmetry is false, but restrictive asymmetry is true.

5. A Contractarian Argument

In order to support this hypothesis I will develop a simple contractarian argument which draws conclusions about the appropriate configuration of moral rules by enquiring how rational agents choosing under ideal conditions of impartiality would configure them. Contractarian arguments are an attractive way of approaching problems like the rules of war for a number of reasons. As an ethical thought experiment, contractarian arguments provide a structured way to generate concrete moral conclusions on specific issues. Moreover, when properly constructed, a contractarian thought experiment can integrate deontological and consequentialist aspects of our

moral experience. With its emphasis on impartiality and the rational consent of free agents, a contractarian approach captures key aspects of the concept of justice.[24] At the same time, because the hypothetical contractors in the original position are influenced by a concern for their own future welfare, contractarian arguments can also be utilized to generate rule-consequentialist conclusions. Richard Brandt, for example, uses a contractarian argument to explore a rule utilitarian approach to war in his classic article, 'Utilitarianism and the Rules of War'.[25]

We are to imagine all potential parties to war in an original position from which they have full factual knowledge about the world, but no knowledge of how they will be situated within it. Thus they know about the political, sociological, psychological and technical aspects of war and conflict, and they know that on occasion their own state will be involved in war, but they do not know whether they will be soldiers or civilians, whether they will be members of the winning or the losing side, or the just or the unjust side of a given conflict.[26] We need not make the implausible assumption that the contractors are pure rational hedonists, concerned solely with their own future happiness or welfare. Instead it is more helpful to conceive of agents in the original position as having reasonable desires that their own behaviour comply with important and well established pre-existing moral commitments and requirements. Thus I will suppose the contractors in my thought experiment to be motivated both by a self-interested concern for their future welfare and by a desire to respect important rights. For the sake of simplicity I will also assume that my contractors have already reached a consensus on the basic content of both the *jus ad bellum* and *jus in bello* and that these norms are generally in conformity with standard current interpretations. What remains for the original contractors to decide is how the *jus in bello* component of the laws of war is to relate to the *jus ad bellum* component. Would ideal rational agents adopt a symmetry interpretation of *jus in bello*, or would they opt for permissive or restrictive asymmetry, or both?

Let us consider the question of permissive asymmetry first – the suggestion that just combatants, because of the justice of their cause, have increased *in bello* privileges. Contractors in an original position would have decisive reasons for rejecting permissive asymmetry. Why is this? The conclusion stems from two

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[24] Ever since the publication of Rawls's *A Theory of Justice*, contractarian arguments have been viewed principally as mechanisms for investigating the nature of justice. See J. Rawls, *A Theory of Justice* (Oxford, Oxford University Press, first edn. 1971, revised edn. 1999).

[25] R.B. Brandt, 'Utilitarianism and the Rules of War', 1 *Philosophy and Public Affairs* (1972), pp. 145-165.

[26] There is an important question as to whether the contractors in the original position are to be conceived as individuals, or as the representative of states or peoples. In *A Theory of Justice* and *The Law of Peoples*, Rawls supposes that the norms of international justice are to be determined by ideal agreement between the representatives of peoples, collective political and ethnic entities, rather than individual persons. I am sceptical of this interpretation of social contract theory in the international relations as it appears to me to be inconsistent with the individualistic underpinnings of social contract theory. However, for our present purposes we need not settle this issue, because I believe that the same interpretation of *jus in bello* would result whether we conceive of the original contract as being made by individuals or the representatives of peoples.

facts accessible to contractors within the original position. The first fact is that across the universe of possible wars, most combatants at most times will be engaged in a war that is unjust. The second fact is that when engaged in an unjust war, most combatants will mistakenly believe their war to be just.

How are these two claims substantiated? The first fact would seem to be a simple logical consequence of just war theory itself. It may be derived from the observation that under standard interpretations of *jus ad bellum* it is not possible for a war to be just on both sides simultaneously, but it is possible (and indeed relatively common) for a war to be unjust on both sides.[27] Contractors in the original position can therefore know *a priori* that at most 50% of all wars (understood as the prosecution of war by one party) can be just. If all wars are just on one side and unjust on the other side, then the percentage of just wars will be 50%; if some wars are unjust on both sides then the percentage will be less than 50%. Therefore if just one conflict in the universe of possible wars is fought unjustly on both sides, it will be the case that the majority of all possible wars are fought unjustly, and the majority of combatants across the total class of wars will be unjust combatants.[28]

Despite the predominance of unjust over just war, most combatants will believe their wars to be just whether they are in fact just or not. This claim is supported by three observations available to the original contractors, one historical, one psychological and one about the moral structure of war. It seems to be true that historically the majority of wars have been claimed to be just on both sides. Many 20th century wars were claimed to be wars of self-defense by both sides! Some of these claims may simply represent bad faith and propaganda on the part of war-leaders. But there is good reason to believe that soldiers and statesmen will often sincerely believe their wars to be just, whether they are in fact or not. This is because of an important fact about the psychology of war. War is so difficult, so dangerous and so costly, that it is exceptionally difficult for ordinary humans to undertake it without believing that they are in pursuit of a cause that is noble and just.[29] This psychological observation is linked to a fact about the moral structure of war, namely that in most wars, justice is precisely one of the matters at issue between the competing sides. That is to say, war typically occurs when rational forms of discourse and conflict resolution (negotiation, arbitration, legal adjudication) have failed. If

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[27] This is a consequence of basic principles of Just War Theory, and is a feature of modern international law. Classical statements of this doctrine can be found in Grotius (H. Grotius, *De Jure Belli Ac Pacis*, Classics of International Law, New York, 1964, Bk. ii p. 565) and Vitoria (F. Vitoria, *De Indis Relectio Posterior, Sive de Jure Belle*, in Pagden and Lawrence, *supra* n. 19, 2.4 (p. 313)). For the position of modern international law see Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press 1988), p. 168.

[28] This last claim contains an implicit assumption concerning numbers. The assumption is that just wars are not on average fought with more combatants than unjust wars. This does not seem an unreasonable assumption to make.

[29] Of course there have always been mercenaries, soldiers motivated in part or in whole by the material rewards of war, as well as simple marauders who raid and kill for nothing more than booty. But at least since the French revolution the great wars have not been sustained primarily by mercenary motives, but by mass ideologies with concomitant beliefs about the justice of war, whether they centre on the spread of liberty, the importance of supporting class struggle or the historical destiny of a *volk*.

combatants agreed with respect to which party had justice on their side, they would not need to have recourse to war. War begins where moral consensus ends. Typically the breakdown of rational moral discourse and agreement is one of the factors that precipitate war. Because most conflicts arise from competing interpretations of circumstances relating to justice, it is to be expected that most combatants in most wars will believe themselves to be fighting a just war.[30]

Suppose then that is true that (i) most wars in which combatants may potentially fight will be unjust and (ii) when engaged in an unjust war, most combatants will mistakenly believe their war to be just. Given this, contractors would have decisive reasons to reject permissive asymmetry. This is because accepting it would expose them and their compatriots to two significant forms of risk on the battlefield: one is a form of moral risk and the other a physical risk.

Firstly the moral risk. If permissive asymmetry were adopted as an interpretation of *jus in bello*, contractors would run a high risk of fighting in a war which they believe to be just but which was in fact unjust. In such a circumstance they would inflict incidental harm on non-combatants in accordance with a mistakenly liberal interpretation of proportionality, which was not in fact morally justified (for example they would ascribe to themselves an increased liberty to inflict collateral damage on enemy non-combatants). Thus they would be exposed to a high moral risk of committing serious injustice in war.[31]

Suppose on the other hand that the contractors found themselves fighting a just war, and it was their opponents who were fighting an unjust war which they believed to be just. Then they would be exposed to a risk of increased physical harm, since their enemies would inflict upon them unjust and excessive collateral harm in accordance with a mistakenly liberal interpretation of the proportionality requirement.

Would these significant risks entailed by accepting permissive asymmetry be balanced by any countervailing advantages? It does not appear so. Even in a case in which the contractors found themselves fighting a genuinely just war, permissive asymmetry would not yield any significant military advantage in achieving the just war aims. This is because it is likely that the unjust enemy, believing themselves to be just, would simply ascribe to themselves equal *in bello* privileges. Hence the total destructiveness of the war would be increased without yielding either side any decisive military advantage.

Permissive asymmetry is not sustainable as an ethic of war because of the radical unreliability of the *ad bellum* judgments that combatants can be expected to make in the course of a war. Permitting a combatant to apply a norm of permissive asymmetric privilege would be like permitting a criminal defendant to try and sen-

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[30] To say that mistaken belief in the justice of one's war is common is not to say that it is morally justified or even excusable. It is simply to say that there are strong psychological and sociological forces motivating self-deception. Wars are often motivated by real disagreements as to justice or right, but it does not mean these disagreements are reasonable.

[31] As I explained above, I take my original contractors to be motivated not only by egoistic self-interest, but also, in part, by a desire to respect important moral commitments such as basic human rights.

tence his own case, or permitting a person to mediate in their own dispute. No plausible principle of justice would allow such practices.

What then of restrictive asymmetry – the claim that unjust combatants should be denied *in bello* privileges, in particular that they should be denied the privilege of the impunible killing of enemy combatants? Would contractors in the original position accept or reject this thesis? Unlike permissive asymmetry, restrictive is asymmetry is a conservative moral principle in the sense that it limits rather than augments military privileges. Because of this, it does not bring with it moral and physical risks of the form we have just discussed, even on the assumption that *ad bellum* judgments will often be made unreliably in the context of war. Indeed one of its most attractive features is that it contracts rather than expands the scope for permissible harm in war.

But the risks of restrictive asymmetry may be of a different kind. For example it might be thought that holding soldiers liable for participation in an unjust war would adversely affect the ability of states to organize and maintain effective military defence forces. Restrictive asymmetry may carry the risk of making just states vulnerable to aggression, and it is morally important to protect the institutions of a just state. But it is unclear that restrictive asymmetry would endanger just states in this way. Firstly, I do not know of empirical evidence linking the attribution of individual responsibility to reduced military effectiveness.[32] Secondly, even if there is such a link, the security of a just state depends on two factors: firstly its ability to organize and maintain effective defence forces and secondly on the ability of any potential aggressor to organize and maintain effective offensive forces. Given that the norm prohibiting offensive war is tolerably (though by no means perfectly) clear, it seems likely that the potential corrosive effects of personal responsibility on military effectiveness would be felt more strongly by a potential aggressor than a defender. In this way restrictive asymmetry would be likely to increase the net security of just states, even if it does reduce the effectiveness of individual fighting forces.

A second form of risk concerns the possibility that restrictive asymmetry might reduce the likelihood that unjust combatants would comply with important current *in bello* prohibitions such as the norms of non-combatant immunity, necessity and proportionality. Why might this be the case? It has sometimes been suggested that non-combatant immunity is simply the flip side of combatant non-immunity, so that you cannot have the one without the other.[33] But as an analy-

[32] It is often said, for example, that if soldiers were to be held liable for *ad bellum* offences, then armies would presumably be required to grant them at least a *de facto* right of conscientious objection for wars which they believed to be unjust. Soldiers would be required to choose which wars and campaigns they participate in, and such a practice, it is assumed, would destroy the effective fighting discipline of a military force. But this assumption is not borne out by the experience of mercenaries who only have a contractual relationship with their personnel. They are not able to coerce obedience through court marshal the participation in any action, and yet they appear able to field effective and disciplined fighting units.

[33] Lene Bomann-Larsen suggests this in her helpful article on symmetrical war rights. See L. Bomann-Larsen, 'Licence to Kill? The Question of Just vs. Unjust Combatants', 3 *Journal of Military Ethics* (2004), pp. 142-160, pp. 145-146.

sis of the structure of moral obligations this seems false; combatant non-immunity is not a correlate of non-combatant non-immunity. This can clearly be seen in the diagram below which represents the view of *jus in bello* in which permissive asymmetry is rejected and restrictive symmetry is accepted (see Figure 3). This represents what I believe to be the correct interpretation of *jus in bello*. Currently accepted *in bello* restrictions, based as they are on basic human rights, apply equally to both parties but currently accepted *in bello* privileges apply only to the just. There are certainly no conceptual difficulties with such a deontic scheme.

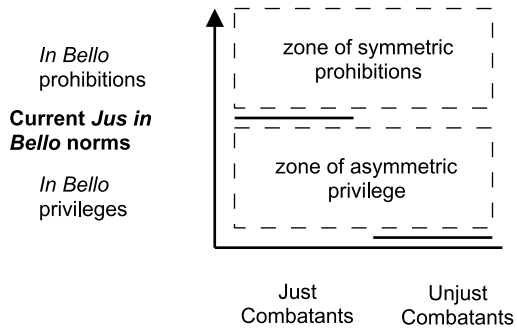

Figure 3

However, the point may be rephrased in a different way. The real issue is not that the privilege and the prohibition cannot be conceptually distinguished, it is that unjust combatants will have no *incentive* to comply with currently accepted *in bello* prohibitions if they are not granted equal war privileges. If there is no moral distinction between harming just combatants and harming non-combatants, then there is little incentive for unjust combatants to abstain from the latter given that they are already committed to attacking the former. However it is simply not the case that restrictive asymmetry is committed to holding that there is no moral distinction between harming just combatants and harming non-combatants. The correct interpretation of restrictive asymmetry is that while harming just combatants in an unjust war is wrong, harming non-combatants is *worse*. The currently accepted *in bello* prohibitions are on this view re-interpreted as aggravating conditions of a broader class of crime.[34] This is after all the way we deal with gradations of criminal action in domestic institutions – we do grant bank robbers the right to shoot armed security guards so as to provide an incentive not to shoot unarmed customers. For this reason, prohibitive asymmetry need not generate any insurmountable problems with perverse incentives.

A final and important area of concern with the proposal of restrictive asymmetry is the issue of victor's justice. There are compelling reasons for contractors in the original position not to grant war victors the right to try and punish enemy

[34] Jeff McMahan makes this point. See McMahan, *supra* n. 5, pp. 693-733, p. 702.

soldiers for acts of war that comply with current *in bello* norms. The primary reason has to do with the observation made above that states and combatants cannot be expected to reliably determine the justice of their own cause. We may expect that any victor in war, will declare themselves just and their enemy unjust. In such a context victor's justice would in many circumstances become a euphemism for revenge and retaliation, with little meaningful correspondence between the 'punishments' inflicted on soldiers and their individual or even collective liability.

Concern about victor's justice is therefore warranted. But it is not an objection to restrictive asymmetry. We must distinguish between liability to punishment in the agent of crime, and the authority to punish in the agent of justice. Restrictive asymmetry is a claim about the former, whereas victor's justice is a problem with the later. Thus a criminal may be culpable of infamous crimes and be liable to punishment, even if, because of corruption, partiality and illegitimacy, there is not a court in the land with the authority to punish him. Soldiers who fight in an unjust war, and who are not excused by reason of duress or non-culpable ignorance, are liable to punishment – just not at the hands of victor's justice. Legitimate punishment of restrictive war crimes requires (as does the punishment of any crime) a legitimate punitive authority which at the very minimum must display independence, neutrality and impartiality.

One might respond that such a conclusion robs restrictive asymmetry of most of its practical impact. For as the world stands, victors are by and large the only bodies capable of punishing unjust soldiers. If victors are not justified in punishing them, then to all intents and purposes they enjoy legal impunity. Yet it is not true that the restrictive asymmetry has no meaningful implications for international law. It may be the case, for example, that soldiers who fight in an unjust war have moral liability to blame, and that moreover they have a legal liability to punishment which is real but *latent*. It is latent in the sense that the liability cannot result in legitimate prosecution and punishment in the absence of a properly authoritative punitive body. But this latent liability may become actualized by the potential future presence of such a body.

Though not currently constituted to prosecute individual soldiers for *ad bellum* violations, the International Criminal Court clearly has the form of authority that would be required to punish unjust soldiers. One practical legal implication of the present argument could be to enhance the power of the ICC to cover individual *ad bellum* offences.[35] Clearly there would be enormous political, institutional and legal challenges to developing such a proposal in the real world, but it seems to emerge clearly as a long-term ethical objective of international politics on the basis of the asymmetry arguments explored here.

[35] The ICC already has jurisdiction for crimes of aggression (See Rome Statute, Art 5.1(d)), though the current legal regime makes it clear that liability for such crimes does not extend to line soldiers.

Chapter 4
CONFLICT TERMINATION AND PEACE-MAKING IN THE LAW OF NATIONS: A HISTORICAL PERSPECTIVE

Stephen C. Neff*

Abstract
This essay examines the historical and conceptual origins of the notion of jus post bellum. It distinguishes a modern notion of jus post bellum from the medieval jus victoriae. It argues that a just bellum is implicit in the very structure and nature of the post-1945 international legal order. It provides also some direction on the future development of jus post bellum in international law

Introduction

Fundamental to the notion of a modern *jus post bellum* is the idea that the termination of armed conflict is a matter of concern to the international community as a whole, and not merely for the parties to the conflict. This idea, as will be explained below, is very far from new. It might appear to be new; but that is only because it came to be submerged during relatively recent history, in particular during the 18th and 19th centuries. This article will first survey the original *jus post bellum*, as it evolved in the just-war era of the Middle Ages – the old *jus victoriae*, as it was sometimes termed. It will then point out the ways in which this body of law fell largely – but not quite entirely – into disuse during the positivist era in the 19th century. The ways in which the law has experienced a renaissance in the 20th century will then be pointed out. Finally, there will be some thoughts on the possible directions which a *jus post bellum* might take in the future development of international law.

1. The Old Jus Post Bellum – The Medieval Jus Victoriae

The expression 'just war' risks being misunderstood if it were thought to refer only to the justice of resorting to armed force (i.e., to the *jus ad bellum*) – although of course that was its most visible and possibly even most important element. But the medieval was far more than that. The doctrine, in its mature form, was intimately concerned with the conduct of hostilities (i.e., the *jus in bello*), as well as with the

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manner in which hostilities were concluded (i.e., the *jus post bellum*, in the proposed modern terminology).

At the heart of this just-war doctrine, as it emerged in its fullest form in the Catholic countries of Europe during the Middle Ages, was the fundamental idea that the resort to armed force was justifiable if its purpose was the vindication of the rule of law. At its most basic, a just war, in this medieval sense, may therefore be said to have been a law-enforcement exercise. Ideally, law enforcement would be carried out by publicly appointed magistrates, acting in the name of community at large. But in the absence of any such public police force in the international arena, there was no realistic alternative to allowing aggrieved parties to enforce their own rights.

There was no doubt during the Middle Ages – any more than there is now – that such a 'system' of justice harboured dangers of the most serious kind. It meant, effectively, that a party to a legal dispute would assume the role of both judge and executioner in his own cause. In the interest of minimizing the abuses to which such an arrangement could so obviously give rise, the just-war doctrine was devised. One of its important components was the conception of *res* – meaning that there must be a precise identification of the 'thing' that was being fought over or disputed. That meant that warfare was not permitted to occur because of, say, mere general animosity between two parties. Closely related to this was the requirement of *justa causa* (or sometimes simply *causa*). This meant that the legal claim of the war-making party to the *res* that was in contention must be well-founded. More specifically, it meant that the war-making party had to be correct in its claim to be entitled to the *res*, and also that there must be no alternative means of obtaining that *res* than resorting to armed force.[1] Warfare, on this model, was regarded, then, as a form of litigation – though prosecuted on the field of battle rather than in a court of law.

During the Middle Ages, comparatively little effort was made to apply this general just-war schema explicitly to the subject of peace-making at the conclusion of conflicts. Nevertheless, certain conclusions on this subject flowed with inexorable logic from the basic principles of just-war doctrine. In the event that the *unjust* party triumphed in the contest, the answer was clear. That party gained no new legal entitlement of any kind. It merely had the good fortune to be successful in its wrongdoing, in the manner of a thief who happened to succeed in escaping with stolen goods. The more interesting question concerned the situation in which the just party prevailed in the hostilities. What terms was it entitled to imposed onto its vanquished (and, by hypothesis, wrongdoing) foe? The answer was that a triumphant just party became entitled to the possession of the *res* over which the war had

[1] Three other components of the mature just-war schema are not of relevance to the present discussion. These were: *personae* (barring certain categories of persons from participating in armed conflict); *animus* (requiring that the conflict be undertaken in a spirit of generosity rather than of egoism); and *auctoritas* (requiring that participation in the conflict be permitted or commanded by the appropriate authorities). For a brief over-view of just-war thought in the Middle Ages, see S. Neff, *War and the Law of Nations: A General History* (Cambridge, Cambridge University Press 2005) pp. 45-68.

been fought. That is to say, that it was entitled to reverse the wrong which the unjust side had committed – but to go no further. In the obvious case of a dispute over title to territory, that would mean, of course, that the victorious side became entitled to possession of the contested area.

The concept of the *jus victoriae* – i.e., the application of just-war thought specifically to the termination of wars, as distinct from their inception and their prosecution – was first articulated in an explicit manner by Francisco de Vitoria in the 16th century, as one of his three fundamental principles governing warfare. In so doing, he took the litigation model of warfare to its logical conclusion, by insisting that a just party, upon achieving military victory,

> 'must think of himself as a judge sitting in judgment between the two commonwealths; he must not pass sentence as the prosecutor, but as a judge. He must give satisfaction to the injured, as far as possible without causing the utter ruination of the guilty commonwealth.'[2]

Alberico Gentili, writing in 1598, directly followed Vitoria's lead, holding that a victorious party 'assumes the character of a just judge and is not merely a partisan'. As such, he is obligated, of course, to ensure that justice is done on behalf of those who were wronged (i.e., himself). But he was also obligated, in the manner of a responsible judge, to show moderation towards wrongdoers, with a view to reinstating them as members in good standing of the larger society.[3] To this worthy end, Gentili emphasized, 'the victor should grant a peace of such a kind as to be lasting'.[4]

It cannot be said that these worthy ideals had any discernable impact on the actual practice of peace-making by states during the Middle Ages. For present purposes, however, the point is not to make any claims of practical effectiveness for the *jus victoriae*, but rather to point out certain general conceptual features of that law which might be of some relevance for the development of present-day (or future) rules in this area. In this regard, one important point that should be carefully appreciated is that this medieval *jus victoriae* was never, so to speak, a 'thing in itself' in the sense of being a free-standing body of law about peace-making as such. Rather, it was simply the set of conclusions which flowed logically from the broader framework of just-war thought. It was, in other words, an application of general just-war doctrine to the specific problem of peace-making.

Another very general feature of the medieval *jus victoriae* that should be noted is that, strictly speaking, a just warrior actually gained nothing whatsoever from his victory in the way of additional legal entitlements, any more than an unjust party would do if it had prevailed. The reason was that the just party, by definition, was already, from the very outset of the struggle, legally entitled to possession of

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[2] F. de Vitoria, *On the Law of War*, in A. Pagden and J. Lawrence (eds.), *Vitoria: Political Writings* (Cambridge, Cambridge University Press 1991) p. 327.

[3] A. Gentili, *On the Law of War*, translated by J.C. Rolfe (Oxford, Clarendon Press 1933) p. 299.

[4] Ibid., p. 353.

the *res* in question. What the just side gained from victory in the war, therefore, was not anything in the way of additional entitlement, but only the physical possession of the contested *res*. The legal rights of the parties to the conflict, in other words, remained sternly unaltered by the conflict. There was neither creation nor extinction of legal rights on the part of either side, but only the enforcement of pre-existing rights. Applying this principle to the case of disputed territory, what was decided by the conflict was not the question of the right to possession, but only the question of actual possession.[5]

The *jus victoriae* – and by extension the whole framework of just-war thought – can therefore be said to have been conservative in its thrust, in the precise sense that it never involved the creation of new rights, but only the vindication of existing rights. This basic principle had a number of important implications, of which the only most prominent ones may be noted here. One is that, in this way of thinking, there is a well-nigh total exclusion of any consideration of the will of the victorious party. The victorious party does not win the right to impose its personal will, in a general sense, onto the defeated party. It only gains that which it was already entitled to, by the general law. The controlling factor in the fixing of peace terms, therefore, may be said to be the collective will of the community at large, as expressed in the law governing that community. Each member of the community was entitled (at least in principle) to the implementation of that collective will – i.e., to the due enforcement of the rule of law. But no member was entitled to wage war merely for personal aggrandizement or dominance.

Another implication of this *jus victoriae* was that peace-making was, at least in the general case, non-punitive. The unjust (or wrongful) side in the war was required, upon defeat, to cease its wrongdoing and to yield up anything which it had been wrongfully withholding from the just party. But once the legal situation had been set right, normal community life continued. Here, the image continued to be very much one of civil litigation. A civil litigant whose cause is just wins from his opponent either possession of disputed property or compensation for a past injury – but it is not entitled to inflict any corporal (or other) punishment upon his adversary. Punishment is the prerogative of a magistrate. That meant that, if a party possessed the property of another as a result of outright theft, without any *bona fide* belief in legal entitlement, then the public authorities could prosecute and punish that person as a criminal or a disturber of the general peace of the community. But the lawful owner of the property, in his private legal action, was entitled to no more than the recovery of the property (or payment of its value if recovery was impossible). At the level of international affairs, where there is no magistrate, the possibility of criminal punishment was absent. There was only the right of the aggrieved party to recover his loss.

It might be thought at first instance that this *jus victoriae* was, by its nature, a formula for moderation in peace-making. And so it was, in the sense (as just

[5] For a clear exposition of this principle, see C. Wolff, *The Law of Nations Treated According to a Scientific Method*, translated by J.H. Drake (Oxford, Clarendon Press 1934) pp. 492-493.

discussed) that it barred the victorious party from extorting any gain beyond its pre-existing legal entitlement, and that, by the same token, it protected the defeated side – even though it was the wrongdoer – from suffering punitive measures. It should be noted, however, that this *jus victoriae* could nevertheless, in some circumstances, entail extremely great hardship for the defeated party. This is because of the principle that the just side was entitled, in modern parlance, to recover the costs of the litigation – i.e., to claim from the defeated side not only the *res* over which the war had been fought, but also recompense for the whole of the expenses that it incurred in the waging of the war itself – a burden that was potentially extremely onerous.[6]

With the passage of time, less emphasis was placed on the logical rigour of the classical *jus victoriae*. In place of the strict duties of the judge, writers began to substitute a rather more general – and vague – urge towards moderation. Hugo Grotius, for example, did not stress the limitations on the freedom of victorious parties with any thing like the emphasis that Gentili had done only a generation earlier. He stated it to be a matter of 'honour', rather than of strict law or logic, that a victor should 'incline to clemency and generosity' – although he did go on to state, somewhat cryptically, that 'sometimes, in consideration of the circumstances, such a course is even made necessary by the rule of custom.'[7] Emmerich de Vattel, in his famous treatise of 1758, paid clear obeisance to the old *jus victoriae* when he maintained that '[a] conqueror's whole right is derived from justifiable self-defense …, which includes the assertion and enforcement of his rights.' But this principle, he went on to stress, carried the important corollary that the victor 'should choose the least severe measures, and should remember that the natural law only allows him to injure his enemy precisely in so far as is necessary for his own just defense and reasonable protection for the future.'[8]

2. The Decline of the Jus Victoriae

If the general thrust of the *jus victoriae* remained clearly alive in the writings of publicists well into the 18th century (as just observed), it must be conceded that it had little discernable effect on state practice during the period. In material terms, the principal reason was that the European conflicts of the 17th and 18th centuries seldom ended in outright victory for one party. Peace negotiations, far from being occasions when a victorious power lorded it over a vanquished one, were bargaining sessions by thoroughly practical and hard-headed (not to say hard-hearted) statesmen. Territories, thrones, commercial privileges, fortresses, colonies – all of these

[6] See, to this effect, Gentili, *supra* n. 3, pp. 298-299; H. Grotius, *On the Law of War and Peace*, translated by F.W. Kelsey (Oxford, Oxford University Press 1925) pp. 758-759; J. Locke, *The Second Treatise of Government*, edited by M. Goldie (London, J.M. Dent 1993) pp. 208-210; and Wolff, *supra* n. 5, p. 406.

[7] Grotius *supra* n. 6, p. 826.

[8] E. de Vattel, *The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, translated by C.G. Fenwick (Washington, D.C., Carnegie Institution 1916) p. 310.

were so regarded as many items to be haggled over, on the basis of whatever bargaining power the force of arms had conferred onto the parties. This meant, in turn, that peace-making was no longer conservative in the sense of being directed towards the restoration of pre-existing legal entitlements. Instead, peace treaties routinely and unquestioningly functioned as the sources of *new* rights for states. Obvious illustrations were offered by instances of transfers of title to territories in peace treaties (such as the transfer to Britain of Gibraltar by Spain, provided for by the Treaty of Utrecht of 1713.[9]

By the middle of the 18th century, international-law writers were prepared to grant full recognition to this state of affairs. Vattel, most notably, readily conceded that peace treaties were inevitably matters of compromise, and that the law which governed them was, accordingly, the general law of treaties.[10] This was so, he maintained, even if one party to a peace agreement 'consented' to the arrangement only as a consequence, or in the face, of military defeat. Even in such a situation, Vattel insisted, the defeated state freely chooses to accept a disadvantageous peace as a rational alternative to continuing the struggle and facing yet further losses in the future.[11]

Traces of the old *jus victoriae* continued to be in evidence, but only at the extreme margins. This was in Vattel's concession that 'hard, disgraceful, and unendurable terms of peace' could not be regarded, in law, as a true peace, even if there had been a formal acceptance of them by the defeated party. Such an arrangement could only be regarded as (in Vattel's words) a 'show of peace' which the defeated state only 'endures so long as it lacks the means to free itself; it is a yoke which men of spirit will throw off at the first favourable opportunity.' The historical example that he gave was the peace foisted onto the Aztecs by the Spanish conquistadores in the 16th century. Vattel went on to state that only '[e]quitable adjustments, or those which are at least endurable' can qualify legally as true peace agreements – i.e., as obligations that are legally binding on the vanquished side. Jean-Jacques Burlamaqui, at about the same time, wrote in a broadly similar vein, holding that a just victor who imposes a harsh and cruel peace onto his vanquished adversary 'abuses his victory', with the result that 'the law of nations cannot authorise such treaties, nor lay an obligation on the vanquished tamely to submit to them.'[12]

It is important to appreciate, however, that this principle that an unduly harsh peace lacked legal validity operated only at the extreme margins of state practice. The general rule was that peace arrangements that were merely 'hard and burdensome in certain respects' were fully binding.[13] The broader point, then, is that the terms of peace treaties were increasingly seen, in principle, in terms of the

[9] Great Britain-Spain, Treaty of Utrecht, July 13, 1713, 28 *CTS* 295, Art. 10. For an excellent illustration of multiples transfers of possessions as part of the peace-making process, see the Treaty of Paris, 12 February 1763, 42 *CTS* 279.

[10] Vattel, *supra* n. 8, p. 350.

[11] Ibid., p. 356.

[12] J.-J. Burlamaqui, *The Principles of Politic Law*, translated by T. Nugent (London, J. Nourse 1752) p. 351.

[13] Ibid., pp. 356-357.

consent (or 'consent') of the parties to them – with no substantive guidelines or norms from general international law as to the contents of peace arrangements. The medieval *jus victoriae*, it may be said, had given way to the general law of treaties as the governing law of peace settlements.

The 19th century, with the full flowering of the positivist view of international law, was a maximally inhospitable climate for the *jus victoriae*. Given the central role assigned, in positivist thought, to the will of states as the primary (or even exclusive) source of international law, there was no longer any barrier to the thesis that peace treaties could be the source of new rights for the victorious states. Moreover, this thesis was taken, in practice as well as in doctrine, to its logical conclusion, with the result that victorious countries had no hesitation in acquiring territorial and other rights to which they had not the slightest legal claim prior to the conflict. (In medieval parlance, it would be said that the principle of *res* was discarded in this period.) Confining ourselves only to the most obvious examples, we could call to mind the US's acquisition of its present-day southwestern area from Mexico in 1848 (by the Treaty of Guadaloupe-Hidalgo), as well as of the Philippine Islands from Spain in 1898 (by the Treaty of Paris).[14] Germany's acquisition of the bulk of Alsace and Lorraine from France in 1871 is another example, as is Japan's acquiring of Formosa, the Pescadores Islands and the southern portion of the province of Fêng-Tien from China in 1895.[15]

The era of 'victor's justice' had well and truly arrived. Perhaps its most explicit recognition, in a judicial context, was by the Permanent Court of Arbitration in the Venezuelan Preferential Case of 1904. When Venezuela defaulted on loan repayments, three countries (Britain, Germany and Italy) mounted a naval blockade against it, as a result of which Venezuela 'agreed' to resume its debt payments – while at the same time agreeing to grant the three blockading powers a preferential position in the repayments arrangement. The creditor countries which had not participated in the blockade strenuously objected to that preferential scheme. Their contention, in effect, was that the blockade simply induced Venezuela to end its non-payment practice and to perform its pre-existing obligations – i.e., to effectuate the pre-existing legal situation, under which no creditor had preferential status over any other. The Court ruled otherwise, however, holding the preferential arrangement to be lawful. The result, then, was that the military coercion operated to create new rights and not simply to enforce pre-existing ones.[16]

And yet, even in the 19th century, at the highest tide of the positivist outlook, some vestiges of the old *jus victoriae* did remain. This was the case chiefly in two areas. First, it sometimes occurred that, in the wake of an armed conflict, the international community stepped in to moderate the demands of the winning side, in the interest of maintenance of the broader collective interest. The most conspicu-

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[14] Mexico-U.S.A., Treaty of Guadaloupe-Hidalgo, 2 February 1848, 102 *CTS* 29, Art. 5; and Spain-U.S.A., Treaty of Paris, 10 December 1898, 187 *CTS* 100, Art. 3.

[15] France-Prussia, Treaty of Frankfurt, 10 May 1871, 143 *CTS* 163, Art. 1; and China-Japan, Treaty of Shimonoseki, 17 April 1895, 181 *CTS* 21, Art. 2.

[16] Venezuelan Preferential Case, 9 *RIAA* 103 (1904).

ous occasion was in 1878, when the great powers intervened to moderate, and to some extent to reverse, the peace terms that a victorious Russia imposed onto a defeated Turkey.[17] Similar interventions in 1895 served to moderate Japan's demands upon a defeated China.[18] And the active mediation of President Theodore Roosevelt of the United States in the peace negotiations between Japan and Russia in 1905 led to Japan's gaining rather less from its victory than it thought itself 'entitled' to.[19] These instances were, however, *ad hoc* interventions by the powers on the basis of political and strategic considerations, rather than on the basis of anything like the old *jus victoriae*. But they nonetheless give an indication, if only a minimal one, that the idea of a general community interest in peace-making was not altogether dead.

The second shadow of the old *jus victoriae* that was evident (to those with sharp enough eyes) in the 19th century concerned the question of financial impositions in peace treaties. These first became common during the French Revolutionary Wars. They were also a feature of the Vienna settlement of 1814-1815, when an indemnity of seven hundred million francs was imposed upon defeated France.[20] In 1871, a particularly heavy indemnity was imposed, again onto France, at the conclusion of the Franco-Prussian War. Some writers – chiefly French ones – insisted that indemnity obligations must be carefully crafted to be just that, i.e., to be reimbursements to the victorious powers of expenses actually undertaken in prosecuting the war, as distinct from arbitrary sums imposed as a punishment.[21]

A concrete sign of this mentality in action was apparent in the Treaty of Versailles of 1919, with its famous – though not always well understood – provisions for 'reparations'. Actually, there were two provisions of the treaty on this subject. And it is significant that both of these were carefully placed outside the part of the treaty that dealt with penal matters. The penal aspects of the settlement, in the strict legal sense, were those relating to the prosecution of persons accused of war crimes, and also to the criminal prosecution of ex-Kaiser (as he now was) William II, as an individual, for 'a supreme offence against international morality and the sanctity of treaties.'[22] The money payments by the state of Germany, in contrast, were carefully crafted to be compensatory only, at least in principle. They were also carefully designed (largely at the insistence of American President Woodrow Wil-

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[17] For Russia's original terms, see Russia-Turkey, Treaty of San Stefano, 31 January 1878, 152 *CTS* 363. For the terms of the eventual treaty, see Russia-Turkey, Treaty of Berlin, 13 July 1878, 153 *CTS* 171.

[18] China-Japan, Treaty of Shimonoseki, 17 April 1895, 181 *CTS* 21.

[19] Japan-Russia, Treaty of Portsmouth, 5 September 1905, 199 *CTS* 144. As a result of American pressure, Japan was induced to settle for only half of the island of Sakhalin, rather than the whole of it, and to forgo its claim to a large financial payment.

[20] Treaty of Paris, 20 November 1815, 65 *CTS* 251, Art. 4.

[21] See, for example, H. Bonfils, *Manuel de droit international public* (*Droit des gens*) (Paris, A. Rousseau 1894) p. 889; F. Despagnet, *Cours de droit international public*, 3rd edn. (Paris, L. Larose et Forcel 1905) pp. 713-714; and T. Funck-Brentano and A. Sorel, *Précis du droit des gens*, 2nd edn. (Paris, E. Plon 1887) pp. 322-327.

[22] Treaty of Versailles, 26 June 1919, 225 *CTS* 188, Part VII, Arts. 227-230. This portion of the Treaty was entitled 'Penalties'.

son) to be based on actual fault on Germany's part and not merely on the fact of Germany's military defeat. The first of these financial provisions (the so-called 'war guilt clause') articulated the general principle that Germany and its allies had been solely responsible for the conflict – and consequently for 'causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected.'[23] That clearly meant that Germany was legally obligated to reimburse the Allied and Associated powers (i.e., the just side) for those costs, in their entirety. This was immediately followed, however, by the second provision, concerning the actual payment that Germany would be required to make, which (for various strictly practical reasons) would be confined to a lesser sum: compensation for damage inflicted upon civilian persons and property in the Allied states.[24] It was this lesser sum that constituted the (so-called) reparations.

3. After the Great War

Since World War I, the subject of international armed conflict has been revolutionized by, first, the drafting of the League of Nations Covenant and, later, by the conclusion of the United Nations Charter. Neither of these treaties had anything whatever to say about the law relating to the conduct of war (the *jus in bello*), nor anything to say – at least expressly – about the law which guides the conclusion of hostilities (the *jus post bellum*). But if there is nothing explicitly about peace settlements, there are some principles contained in the Covenant and the Charter which implicitly had some relevance to the question. Moreover, certain legal principles on the subject have been articulated in the framework of the League and of the UN activity since the drafting of their respective constitutional instruments. The most important of these may be pointed out briefly.

First, regarding principles implicit in the League Covenant and the UN Charter that are relevant for peace-making. Most striking in this regard is the statement in Article 11(1) of the League Covenant, which declared '[a]ny war or threat of war' to be, automatically, 'a matter of concern to the whole League' – even if the situation in question did not immediately affect member states. The cause of peacekeeping, in other words, is, *per se*, a matter of concern to the international community at large. No such statement was explicitly made regarding peace arrangements; but little imagination is required to reach the conclusion that, in that area too, the general community interest must be ever-present. The reason is readily apparent. An unjust or oppressive peace arrangement, imposed by a victorious power onto a defeated one, without regard to the underlying legal merits of the dispute at hand, may easily be regarded as the seed of a future conflict (i.e., as a threat of war, within the meaning of Article 11(1) of the Covenant).

This idea that the community interest should prevail over the individual interests of states was reinforced, in the League Covenant, by Article 19, which

[23] Ibid., Art. 231.
[24] Ibid., Art 232.

authorized the League Assembly – clearly envisaged as the representative body of the international community interest – to 'advise the reconsideration' of 'treaties that have become inapplicable'. Here too, as in the case of Article 11(1), there is no reference specifically to peace treaties. But, also as in that case, it is easily seen that the provision can readily be applied in that area.

Some attempts were actually made, during the inter-War period, to invoke Article 19 to effect a revision of a past peace treaty. The first one was in 1921, when Bolivia sought a revision of a peace treaty with Chile of 1904, which had (belatedly) concluded the War of the Pacific of 1879-1884. That agreement had involved a transfer of territory to Chile which left Bolivia entirely land-locked.[25] That country addressed a plea to the League Assembly, explicitly invoking Article 19 for a revision of the 1904 treaty. Chile resisted the request, which, in the event, came to nothing.[26] In 1929, China followed suit, attempting to employ Article 19 to bring the problem of 'unequal treaties' to the attention of the League Assembly. At least some of the arrangements that China wished to alter had come about as a result of peace treaties with the European powers. In both of these cases, though, France vigorously objected to the resort to Article 19, out of an obvious fear of setting a precedent for a possible revision of the Treaty of Versailles. It may be noted, though, that, by 1936, France relaxed its policy of intransigence on the subject of Article 19.[27] Nonetheless, no actual treaty revisions were achieved by this route during the League period. (Bolivia, incidentally, resolutely continues its campaign for the reversal of the Pacific War peace terms, still without success.[28])

The UN Charter is, admittedly, somewhat more opaque in these areas than the League Covenant had been. It does not contain a ringing declaration comparable to that of Article 11(1) of the Covenant. But it does authorize the Security Council to take action in the case of 'any threat to the peace' (Article 39). And there appears to be no bar to the Council's considering unjust peace arrangements to fall under this heading, in appropriate circumstances. The question of possible treaty revision in the UN framework, in the manner of Article 19 of the League Covenant, was squarely raised during the drafting of the Charter. In the event, only an indirect provision was made on the subject. This is in Article 14, which entitles the UN General Assembly, in general terms, to recommend 'measures for the peaceful adjustment of any situation, regardless of origin' – i.e., including, but not limited to, treaties – which might 'impair the general welfare or friendly relations among nations'.[29]

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[25] Bolivia-Chile, Treaty of Peace, Friendship and Commerce, 20 October 1904, 196 *CTS* 403, Art. 2. The actual hostilities had been terminated by an armistice agreement. See Bolivia-Chile, Armistice Convention, 4 April 1884, 163 *CTS* 423.

[26] See 1921 *LN Off. J.*, p. 241.

[27] See F.P. Walters, *A History of the League of Nations* (London, Oxford University Press 1952), pp. 717-718.

[28] See, for example, Bolivia to Secretary-General, 20 October 2004, UN Doc. A/59/445 (2004), dolefully marking the hundredth anniversary of the much lamented peace treaty.

[29] On Art. 14 of the UN Charter as a counterpart of Art. 19 of the League Covenant, see S.C. Schlesinger, *Act of Creation: The Founding of the United Nations* (Cambridge, Mass., Westview Press 2003) pp. 167-169.

In the case of both the League and the UN, however, it was the later practice of the organizations, more than their constitutional instruments, which provided evidence of general community concern over the substantive contents of peace arrangements. In the case of the League, the seminal event was the announcement, in January 1932, by American Secretary of State Henry L. Stimson, of what promptly became known as the Stimson Doctrine. The occasion was the invasion of Manchuria by Japan. In a note sent, in identical terms, to Japan and China, Stimson laid down the principle that the United States would not recognize 'any situation, treaty, or agreement' arising out of a violation of the Pact of Paris (the Kellogg-Briand Treaty) of 1928.[30] In March of that same year, the League Assembly pointedly followed the American lead.[31]

During the UN period, the Stimson Doctrine has become – in principle if not always in practice – more firmly grounded in international law, although it made no appearance in the UN Charter. Two particular developments stand out. First was the Declaration on Friendly Relations, promulgated by the UN General Assembly in 1970. This stated that '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.'[32] To be sure, this provision is not, according to its terms, directed towards peace agreements specifically. Nevertheless, the clear implication is that post-conflict arrangements are a matter of concern for the international community as a whole.

The second important appearance of the Stimson Doctrine approach in UN practice is in the Draft articles on State Responsibility, concluded in 2001 by the International Law Commission (a technical body devoted principally to the codification of international law). This formulation sweeps somewhat more broadly than the one in the Declaration on Friendly Relations did, in that it refers not merely to the use of armed force to acquire territory but also, more generally, to any 'serious' breach of a peremptory norm of international law (i.e., of a norm of especially great importance).[33] States are barred from recognizing a situation arising from such a breach as lawful.[34] Here too, despite the absence of any reference to peace agreements specifically, the clear implication is that peace arrangements that entail, or arise from, breaches of fundamental principles of international law will not be regarded by the community at large as being legally valid.[35]

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[30] Note U.S.A. to Japan and China, 7January 1932, in R.J. Bartlett, *The Record of American Diplomacy: Documents and Readings in the History of American Foreign Relations*, 4th edn. (New York, Alfred A. Knopf 1964) p. 530.

[31] League of Nations Assembly, Res. of 11 March 1932, *LN Off. J.*, Special Supp. No. 101, pp. 87-88. On the Stimson Doctrine in League of Nations practice, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius Press 1987) pp. 27-39.

[32] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970), GA Res. 2625 (XXV), part 1, para. 10.

[33] On peremptory norms, see generally A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press 2006).

[34] International Law Commission, Draft Articles on State Responsibility (2001), Art. 41(2).

[35] On the practice of the UN regarding non-recognition of unlawful situations, see generally Dugard, *supra* n. 31, pp. 81-122.

On certain occasions – though admittedly only rarely – the UN Security Council has actually set out substantive guidelines for peace arrangements in the wake of armed conflicts. Two such cases are of particular note. The first was in 1956, in the Suez crisis, when the Security Council specified six principles which, it stated, 'any settlement of the Suez question should meet'.[36] The second was in 1967, when the Council resolved that 'a just and lasting peace in the Middle East ... should include' two stated principles, while also '[a]ffirm[ing] the necessity' of three others.[37] In addition, it may be noted that, in 1991, the Security Council directly laid down the detailed arrangements for the resolution of the Kuwait crisis, in legally binding form (although in this case, the Council was, in effect if not in strict law, itself a party to the conflict, having openly taken sides in the struggle and expressly authorized the resort to force of the pro-Kuwait coalition).[38]

In this connection, it might also be observed that, on one notable occasion, the UN General Assembly has reacted negatively to the terms of one specific peace treaty: the peace agreement of 1979 between Israel and Egypt.[39] The objection was on the ground that, in the negotiation of the treaty, there had been no appropriate representation of the Palestinian people. The General Assembly accordingly expressed the view that the peace treaty had no validity 'in so far as it purport[s] to determine the future of the Palestinian people' and of the Israeli-occupied territories.[40]

4. General Considerations – and a Look Towards the Future

Even if there has been a revival, since WW I, of the idea that the substantive terms of peace settlements are a matter for the international community at large, to be governed by at least certain broad legal principles, the world has far to go before there can be said to be a substantial or systematic corpus of law on the subject – i.e., a *jus post bellum* that is worthy of the name. In this connection, it may be of some use to offer at least some preliminary thoughts in this direction. Most importantly, it may be said that there is one very broad policy issue that calls for consideration. This is the question of whether a *jus post bellum* should be founded upon certain core or basic principles, with the specific rules then derived in logical fashion from those; or whether, alternatively, that body of law should be more empirical or contextual in character, with specific rules devised as needed for specific situations. These two strategies might be referred to, respectively, as the deductive and the inductive approaches to the question.

The first of these alternatives (the deductive one, in the suggested terminology) might itself come in two variations. One possibility would be an approach

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[36] SC Res. 118, 13 October 1956.

[37] SC Res. 242, 22 November 1967.

[38] SC Res. 687, 3 April 1991. For the authorization to use force by the Security Council, see SC Res. 678, 29 November 1990.

[39] Egypt-Israel, Treaty of Peace, 26 March 1979, 1136 *UNTS* 101.

[40] GA Res. 34/65 B, 29 November 1979.

to the problem that is strictly analogous to the medieval *jus victoriae* discussed above. This would mean that the modern *jus post bellum*, like its medieval predecessor, would not, fundamentally, be a body of law about peace-making *per se,* but instead would be the application of more general principles to the particular context of peace-making. The idea here, in broadest outline, would be that various peremptory norms of international law would prevail over, or pre-empt, any incompatible peace arrangements, presumably with the effect that the incompatible arrangements would be automatically void. An important feature of this approach is that the basic mechanism for implementing it is already in place, in the form of the provision of the Vienna Convention on the Law of Treaties that any treaty agreement that is incompatible with a peremptory norm of international law is void.[41] The challenge of developing a detailed body of *jus post bellum* rules would therefore reduce to resolving the question of precisely what rules of international law actually qualify as peremptory norms – a question about which there has already been a great deal of discussion and speculation.

There would seem to be comparatively little difficulty in agreeing on at least certain peremptory norms for this purpose. One of them would certainly be the prohibition against the use of force. But applying even so obvious a principle as this to the subject of peace-making may well involve more difficulties than would be apparent at first. Consider, for example, the non-recognition principle (the Stimson Doctrine). There is no difficulty in concluding that any new situation brought about by an unlawful resort to force should not be legally valid, even if it is incorporated into a peace treaty between the countries immediately affected. But to what extent should the principle apply to a situation such as the forcible recovery of a legal entitlement, such as the recovery by armed force of a territory wrongfully withheld? It is easy to conclude that the unlawful resort to armed self-help should entail the legal responsibility of the state concerned, and that certain appropriate legal consequences should follow. But should the state be required to disgorge the *res* to which it was (by hypothesis) lawfully entitled prior to the unlawful resort to force? An answer to this conundrum cannot be given in the present context. The point is only raised by way of illustration of the basic nature of this variant of *jus post bellum* thought: that it would entail the application of general principles on which there might be clear agreement to the particular problems of peace arrangements – and that such application might well raise special difficulties. The theorists and practitioners of a *jus post bellum* of this sort would be charged with resolving those special difficulties.

The other variant of the deductive approach to the *jus post bellum* would involve the devising of a body of law that was truly a 'thing in itself' (to revert to the expression employed earlier). That is to say, the *jus post bellum*, on this model, would be a set of broad principles specifically tailored to the phenomenon of peace arrangements. This approach would be more challenging than the one just discussed, in that it would not entail taking a set of existing principles 'off the shelf', as it

[41] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331, Art. 53.

were, and applying them to the peace-making context. Instead, it would involve devising a set of principles from a comparatively blank slate. It is therefore difficult, in this present discussion, to make more than the most tentative suggestions as to what might emerge here. One such general principle might be that the guiding principle of peace arrangements must be the *status quo ante*. This would then have logical implications for such issues as the evacuation of occupied territories or the paying of compensation. A difficult question would be the extent to which this principle should give way to human-rights considerations, i.e., whether the restoration to power of severely repressive governments would be required.

A few words (also very tentative) may also be said about the alternative broad approach to a *jus post bellum* – the inductive one (on the suggested terminology). Here, the approach would not be one of starting out with sweeping general principle, but rather of dealing with smaller questions on their own merits, with a view to crafting a constantly growing body of rules from, as it were, the 'bottom-up' (in contrast with the 'top-down' character of the deductive approach). The idea here is that relatively manageable portions of the subject can be dealt with, in a pragmatic manner, as the need arises. On this thesis, the task of the practitioners of a *jus post bellum* would, of course, be to devise this set of rules. Some of the issues that might present themselves may be tentatively speculated upon.

One area in which it would be important to devise rules would probably concern the question of compensation that would be owed by a state that instigated a conflict through the unlawful use of force. Would such a state be required to pay compensation for all losses caused by its action (as Germany was required to do in principle, though not in practice, after WW I)? Or would it be exempt from a duty to compensate for damage caused by the exercise of traditional belligerents' rights (as was the case with Iraq in the 1991 Gulf War)?[42] It might also be thought desirable to devise rules restricting the right of a state which wrongfully resorted to force from punishing those of its nationals who refused to participate in the conflict.

Another topic – and a particularly urgent and difficult one – would be the question of amnesties in the context of civil conflicts. There might be relatively little difficulty in holding that insurgents in civil conflicts must be given amnesties for all *bona fide* acts of war (e.g., for military actions, in accordance with the laws of war, against the armed forces of the state in question). Indeed, Protocol II of 1977 (to the Geneva Conventions of 1949), concerning non-international armed conflicts, already states that governments must 'endeavour' to grant 'the broadest possible amnesty' to insurgents.[43] Consideration could be given to strengthening this obligation. More difficult, though, is the question of whether there should be rules restricting, or even forbidding, the granting of amnesties to persons accused of violations of the laws of war or of laws protecting fundamental human rights.

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[42] On Iraq's non-liability to compensate for belligerent acts in that conflict, see Governing Council of the UN Compensation Commission, Decision No. 11, 26 June 1992, UN Doc. S/24589 (1992), Annex II; reprinted in 31 *ILM* (1992), p. 1067.

[43] Protocol II to the Geneva Conventions, 12 December 1977, 1125 *UNTS* 609, Art. 6(5).

A particularly difficult issue that might face the constructors of a *jus post bellum* would be the question of what to about peace arrangements which were valid in part, but which contained specific provisions that contravened this body of law. Would those offending provisions simply be mechanically excised, with the rest of the arrangement left in place? Or would it be necessary to condemn the agreement as a whole? This issue has arisen in other contexts; but it might have a special degree of urgency in the context of a developing *jus post bellum*.

In conclusion, one very general observation might be offered. That is, that the concept of a *jus post bellum* is likely to be intimately linked to issues of the lawfulness of resorting to force to begin with. The reason for this is readily apparent. If war is seen, as it was during the high tide of positivist thought in the 19th century, as a strictly bilateral matter between the states concerned (i.e., as a sort of 'agreement' by the states concerned to settle a dispute by force of arms, in the manner of a duel), then it is entirely logical that the peace arrangement be regarded in similar terms (i.e., as strictly a matter of the general law of treaties). On this way of looking at things, there is no room for any input by the international community at large. Where, however, the resort to force is seen not as a private arrangement between states, but instead as a matter of the preservation of the public peace of the world at large, the position becomes radically different. Just as the community at large has a stake in the commencement of wars (and in their conduct), so, logically, should it have a stake in the terms of their conclusion. This latter standpoint is the one that accurately reflects the current state of international law.[44] Some kind of *jus post bellum*, in other words, is implicit in the very structure and nature of the post-1945 international order, as it was during the just-war period of the Middle Ages. The challenge now is make that law explicit rather than implicit.

[44] For an extended treatment of this thesis, see generally Neff, *supra* n. 1, pp. 277-356.

Chapter 5
JUS POST BELLUM: MAPPING THE DISCIPLINE(S)

Carsten Stahn*

Abstract
Jus post bellum is a classical concept which has gained new attention in contemporary scholarship. One of the dilemmas of the current debate is that the features and contours of this concept are mostly theorized from the perspective of just war theory. This essay seeks to clarify the contemporary relevance and meaning of jus post bellum as a legal concept. Moreover, it identifies the main areas in which just war theory and legal thinking differ in their theorization.

Introduction

The law of armed force is typically categorized in two bodies of law, *jus ad bellum* (the law on recourse to force) and *jus in bello* (the law governing the conduct of hostilities).[1] Historically, however, there has been an additional parameter in the equation, namely the concept of 'law after war' *(jus post bellum*). This concept has remained at the periphery of legal scholarship,[2] although it has a traditional place in the context of just war theory.[3]

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[1] The terms emerged in legal writing in the 1920s. *Enriques* used the term *jus ad bellum* in 1928. See G. Enriques, 'Considerazioni sulla teoria della guerra nel diritto internazionale', *Rivista di diritto internazionale*, Vol. 20 (1928), p. 172.

[2] Contributions from an international law perspective include D. Thürer and M. MacLaren, 'Ius Post Bellum: A Challenge to the Applicability and Relevance of International Humanitarian Law', in K. Dicke et al., *Weltinnenrecht – Liber amicorum Jost Delbrück*, (Berlin, Duncker & Humblot 2005), pp. 753-782; K. Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', 50 *McGill Law Journal* (2005), p. 285; Carsten Stahn, 'Jus ad bellum', 'jus in bello' … 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force, 17 *EJIL* (2006), pp. 921-943; J. Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for 'Interim Occupations'', 51 *New York Law School Law Review* (2006-2007), p. 497.

[3] See B. Orend, *War and International Justice, A Kantian Perspective* (Waterloo, Wilfrid Laurier Press 2000), 57; id. 'Jus Post Bellum', 31 *Journal of Social Philosophy*, (2000), pp. 117-137, id., *The Morality of War* (Peterborough. Broadview Press 2006), pp. 160-190; G.J. Bass, 'Jus Post Bellum', 32 *Philosophy & Public Affairs* (2004) pp. 384-412; R.P. DiMeglio, 'The Evolution of the Just War Tradi-

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Traces of a tripartite conception may be found in different traditions of thought. St. Augustine linked war to the post-war goal of peace in his *City of God* (around 410) which became one of the most respected and frequently cited books of Church history.[4] This thinking was refined by proponents of the just war theory, such as de Vitoria, the founder of the School of Salamanca and the scholastic Spanish philosopher and theologian Suárez (1621). These scholars made a compelling argument: If a war has a just cause, and is fought justly, it must also lead to a just post-war settlement.[5]

A more refined account of this approach was developed by Hugo Grotius in his Laws of War and Peace (1625), which secularized just war theory on the basis of principles of *natural law* which were held to be binding on all people and nations regardless of local custom. Book III of Laws of War and Peace included not only rules governing the conduct of war, but practical principles on just war termination, such as rules on surrender, good faith and interpretation of peace treaties.[6] This conception was later taken up in the 18th century in the natural law-based works on the law of nations by Christian von Wolff and Emer de Vattel.[7]

Kant completed the *tripdichon* and distinguished three categories: Right to war (*Recht zum Krieg*), Right in War (*Recht im Krieg*) and Right after War (*Recht nach dem Krieg*). Kant associated the 'law after war' with substantive principles of justice, such as the fairness of peace settlements, respect of the sovereignty of the vanquished state and limits on the punishment of people (e.g., through excessive reparation). Some of these principles foreshadow traces of modern peace-making.[8]

Surprisingly, this 'third leg' in the theory of warfare disappeared in the conceptualization of the laws of war in the 19th and 20th century. The *jus in bello* was codified, later the *jus ad bellum*. The *jus post bellum*, by contrast, did not receive much attention. It was only treated in a cursory fashion in some treatises at the beginning of the 20th century.

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tion: Defining Jus Post Bellum', 186 *Military Law Review* (2005), pp. 116-163; L.V. Iasiello, 'Jus Post Bellum: The Moral Responsibilities of Victors in War', 57 *Naval War College Review* (2004), pp. 33-52; A. Rigby, 'Forgiveness and Reconciliation in Jus Post Bellum', in Mark Evans (ed*.), Just War Theory: a Reappraisal* (Edinburgh, Edinburgh University Press 2005); Robert W. Williams and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace', 7 *International Studies Perspectives* (2006), p. 309.

[4] See St. Augustine, *Concerning the City of God Against the Pagans*, London, Penguin 1984 trans. Henry Bettenson, Book 19, Chapter 12, p. 866.

[5] See F. Suarez, 'The Three Theological Virtues, *Disputation XIII*', in James Brown Scott (ed.), *Classics of International Law*, Vol. 20 (New York, William S Hein & Co, 1995), 836; Francisco de Vitoria, *De Indis et de iure belli relectiones* (ed. E. Nys; tr. J. B. Pate), Washington, D.C., Carnegie Institute of Washington 1917.

[6] See H. Grotius*, De Jure Belli ac Pacis*, Book III, in *Classics of International Law* (James Brown Scott (ed.), 1995). Vol. 2, Translation by Francis W. Kelsey.

[7] See E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, Vol. III (1758), English translation by Charles G. Fenwick, 'The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns', in James Brown Scott (ed.), *Classics of International Law*, Vattel, Text of 1758, Books I-IV (1995), at p. 15.

[8] I. Kant*, Science of Right*, under 58 (Right after War).

This finding begs some questions about the structure of international law and legal scholarship in the 20th century. How did this discrepancy between just war theory and the theorization of the law of armed force emerge? Why was the absence of *jus post bellum* not perceived as a gap in the structure of international law? To what extent is it necessary to re-think some of these categorizations today?

This essay seeks to shed a closer light on these questions from an inter-disciplinary perspective. Part one analyses some of the features and contours of *jus post bellum* as a domain of scholarship. It examines why the idea of *jus post bellum* has been neglected in legal scholarship and why it should be taken seriously in the 21th century.

Part two highlights some of the outstanding scholarship problems. An account of the existing literature indicates that *jus post bellum* is treated differently in different disciplines (e.g., among legal scholars and just war theorists), and sometimes even within the very same discipline. At least, three areas appear to require further clarification, if the concept *jus post bellum* is developed from a theoretical principle into a normative framework for the organization of transition from conflict to peace: the nature of the concept, its substantive content and its operation (e.g., applicability and scope of the principle of distinction).

1. Jus Post Bellum as a Domain of Legal Scholarship

Throughout much of the 20th century, the period of transition from conflict to peace has been neglected in legal science. Works by scholars such as Oppenheim[9] and Phillipson[10] outlined a number of principles guiding the ending of wars and the formation of treaties of peace. However, treatises of international law remained largely silent on the question whether and to what extent rules of international law shape the very contents and grand strategies of peace-making.

This omission may be explained by some historical factors (e.g., the gradual development of international law and the case-by-case treatment of major peace settlements in the history of the 20th century[11]), but it has at the same time some deeper structural reasons.

1.1 **Causes of scholarly disregard**

At the beginning of the 20th century, it was difficult to conceive the period of transitions from war to peace as a separate normative paradigm, because international law itself was seen as bipolar system focused on the strict distinction between state of war and state of peace.[12] War and peace were seen as 'ying' and 'yang', namely

[9] See L. Oppenheim, *International Law, A Treatise*, Vol. II (1906) pp. 280-298.

[10] See, *inter alia*, Coleman Phillipson, *Termination of War and Treaties of Peace* (New York, EP Dutton & Company 1916)

[11] See generally I. Clark, *Legitimacy in International Society* (Oxford, Oxford University Press 2005).

[12] See also the discussion by S. Neff, *War and the Law of Nations* (Cambridge, Cambridge University Press 2005), at pp. 177-196.

as two aggregates which complement each other. However, the grey zone between these two poles, namely the transition from war to peace was not treated as a paradigm in terms of law. This diametrical opposition is epitomized in the first editions of Oppenheim's famous treatise on international law which categorically distinguished the law of war and the law of peace.[13] It was only in the 1940s that international lawyers began to seriously question this bipolar theorization of international law.[14]

This finding coincides with a further systemic reason. The absence of legal rules and principles was to a certain extent a corollary of prevailing conception of international law as *jus inter gentes*, rather than a *jus gentium*.[15] In a legal order that was centered on the interests of states and inter-state relations, peace-making itself was largely conceived as a process governed by the discretion of states.

The Treaty of Versailles, for instance, contained some traces of modernity, such as the reference to the criminal accountability of the German emperor, the provisions for the protection of national minorities and the integration of the founding instrument of the League of Nations into the peace settlement.[16] However, the goal of sustainable peace-making was overshadowed by the political interests (*Machtpolitik*) of the victorious powers. The terms of the agreement were essentially set by a bargaining process of the victors of the rights and obligations of the vanquished.[17] Reparations were punitive to the extent that they were based on 'war guilt'.[18] Moreover, self-determination was not viewed as a binding legal rule, but as a flexible principle. It had to yield where it conflicted with overriding strategic interests of the victorious powers.[19] It does therefore not come as a surprise that the

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[13] See Oppenheim's *International Law*, 6th edn., Vol. I (Peace) (1947) and Vol. II ('War and Neutrality') (1944) (ed. by H. Lauterpacht).

[14] Some authors began to advocate the existence of a grey zone between war and peace in the 1940's, arguing that there are situations in international law which are 'incompatible with the states of peace and war'. See G. Schwarzenberger, 'Jus Pacis, Ac belli?', 37 *AJIL* (1943), pp. 460 at 470. See also P. Jessup, 'Should International Law Recognize an Intermediate Status Between War and Peace', 48 *AJIL* (1954), p. 98.

[15] For a recent treatment, see Benedict Kingsbury*, Global Regulation, Jus Gentium and Inter-Public Law*, NYU Working Paper, at <www.law.nyu.edu/kingsburyb/fall06/globalization/papers/Kingsbury,NewJusGentiumandInterPublicI1pdf>.

[16] See J. L. Knudson, *A History of the League of Nations* (Atlanta, Georgia. TE Smith & Co 1938) at pp. 177-178.

[17] The Agreement was negotiated primarily by the United States., Great Britain and France. Germany was not allowed to participate in the drafting of the treaty. Only after the treaty was drafted were its terms communicated to the defeated powers.

[18] See Art. 231 of the Treaty of Versailles. John Maynard Keynes, a leading British economist, criticized the severe financial burdens and cessions of territory within the treaty as threat to the financial equilibrium of the continent. He noted that Germany could not 'be trusted with even a modicum of prosperity … for at least a generation' as a consequences of the reparations, the amount of which would keep the country 'impoverished and [its] children starved and crippled'. See J. Keynes, *The Economic Consequences of the Peace* (New York, Harcourt, Brace & Howe 1920), p. 267.

[19] Self-determination did not serve as a means of ending colonial ambitions or as an instrument to empower groups to foster their own national identity in general. It meant, above all, that the new borders of Europe would as far as possible be drawn among national lines. The Mandates System was partly created in order to ensure the orderly division of the colonies of the defeated nations. The Ger-

process of peace-making after war itself was not codified in the inter-war period when *jus ad bellum* and *jus in bello* began to emerge as legal notions.

The peace settlements after World War II present a slightly more nuanced picture. Human rights clauses and provisions for criminal adjudication became integral features of peace treaties with former enemy powers.[20] In the cases of Germany and Japan, victory was combined with economic, social and legal reconstruction. But peace-making continued to be treated as a negotiable settlement, shaped by the open play of realist forces. The Charter rules were declared inapplicable to the process of peace-making with the 'enemy' powers.[21] Germany and Japan were not administered under the supervision of the United Nations or classical occupation law, but under the exceptional rules of post-surrender occupation.[22] The Allied Powers continued to defend the view that forcible acquisitions of territory are an appropriate recompense for wartime losses.[23] Moreover, self-determination was applied in an incoherent fashion in territorial settlements.[24] Peace-making was thus essentially regarded as something exceptional that operates on a case-by-case and outside the framework of the United Nations Charter. Some legal scholars like

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man and Turkish colonies were transferred to Australia, Belgium, Britain, France, Japan, New Zealand and South Africa as mandates. The victors themselves refused to place their own colonial possessions under this regime. Finally, in the context of territorial delimitation, self-determination was only applied to selected territories of the defeated powers. See generally D. Orentlicher, 'Separating Anxiety: International Responses to Ethno-Separatist Claims', 23 *Yale Journal of International Law* (1998), pp. 1, 33.

[20] This trend is particularly visible in the case of the 1947 peace treaties with Bulgaria, Finland, Hungary, Italy and Romania. These agreements were clearly dominated by the intention of preventing the resurgence of fascist or militaristic movements through internal democratization on the basis of fundamental human rights. A good example is Art. 17 of the Treaty of Peace with Italy which expressly states that 'Italy shall not permit the resurgence on Italian territory of [Fascist] organizations, whether political, military or semi-military, whose purpose is to deprive the people of their democratic regimes'. A further example can be found in the 1951 Treaty of Peace with Japan, in which Japan agrees to 'create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation'. See para. 2 of the preamble of the Treaty of Peace with Japan, 8 September 1951.

[21] This is reflected in the 'enemy state' clause contained in Art. 107 of the UN Charter, which states that '[n]othing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action'.

[22] See E. Benvenisti, *The International Law of Occupation* (Princeton, Princeton University Press 1993, pp. 91-96.

[23] Germany and Japan were stripped of their title to certain territories. The Königsberg area of East Prussia and South Sakhalin and the Kurile Islands were passed on to the Soviet Union in return for Soviet participation in the war. The United States gained exclusive control over the Japanese mandated islands in the Pacific, which were later placed under the Trusteeship System. Furthermore, all German territories east of the Oder-Neisse Line (including Danzig and Eastern Prussia) with nearly nine million inhabitants, a majority of whom were German, were ceded to Poland in order to provide a short and more easily defensible border between Poland and Germany.

[24] While the overseas empires of Western European states began to dissolve, 'large Latvian, Lithuanian, Estonian, Polish, German, Romanian, Hungarian and Slovak inhabited territories in Europe were being annexed arbitrarily by neighbouring states'. See T. Franck, *The power of Legitimacy Among Nations* (New York, Oxford University Press 1990), p. 162.

Wilhelm Grewe even continued to conceive peace-making as an 'art' rather than a legal paradigm until the 1980s.[25]

1.2 The case for renewed attention

Why does this conception require a fresh look at the beginning of the 21st century? Currently, this very question is answered differently by different protagonists and disciplines.

Scholars in the field of just war theory have offered a number of theoretical explanations. It has been argued that it is important to theorize post-war justice for the sake of a more complete just war theory.[26] Others claim that a *jus post bellum* is needed for strategic purposes, namely to avoid a fall into anarchy following intervention.[27] Again others, like Michael Walzer, have argued that we need a *jus post bellum*, because the post-war execution of the goals of war has an impact on the overall judgment of war[28] – an argument which attracted wider attention in debate about the Iraq intervention.

In this latter context, the notion of *jus post bellum* has also gained some prominence in legal doctrine. *Jus post bellum* is increasingly viewed by legal scholars as a framework to deal with the challenges of state-building and transformation after intervention. Recently, it has been associated with different phenomenons such as transformative occupation,[29] the conduct of legislative reform in post-conflict zones[30] or the consolidation of the rule of law after intervention more generally.[31]

These observations provide evidence that the law of occupation is increasingly perceived as an insufficient answer to the legal challenges of peace-building. But it is necessary to go a step further. The fundamental question is whether *jus post bellum* can be understood in a broader normative sense, namely not only a moral principle or a legal catchword, but as a concept which regulates the relationship between different actors in conflict-related and peacetime-based situations of transition.

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[25] W.G. Grewe, 'Peace Treaties', in *Encyclopedia of Public International Law* (1997), Vol. III, p. 940, written in 1982. For a study of Grewe, see B. Fassbender, 'Stories of War and Peace: On writing the History of International Law in the 'Third Reich' and After', 13 *EJIL* (2002), pp. 479-512.

[26] See Bass, *supra* n. 3, pp. 384-412.

[27] See N. Feldman, *What We Owe Iraq: War and the Ethics of Nation-Building* (Princeton, Princeton University Press 2004), at p.3, who argued that the collapse of law and order and domestic structures following the Iraq intervention created a moral duty for coalition members to stay in Iraq and a moral justification to exercise 'temporary political authority as trustee on behalf of the people governed, in much the same way that an elected government does'.

[28] See M. Walzer, 'Just and Unjust Occupation', *Dissent* (Winter 2004), 'Regime Change and Just War', *Dissent* (Summer 2006).

[29] See A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006), pp. 580 at 619.

[30] See Boon, *supra* n. 2, pp. 285-325.

[31] See C. Schaller, *Peacebuilding und ius post bellum, Völkerrechtliche Rahmenbedingungen der Friedenskonsolidierung nach militärischen Interventionen* (Berlin, Stiftung Wissenschaft und Politik, 2006).

Such a re-thinking of the existing categories of law has been suggested in legal scholarship.[32] It receives support from several factors: certain structural changes in the international legal order, international practice in the field of peace-making and apparent inadequacies in the existing architecture of the law of armed force.

1.2.1 *Erosion of the war/peace dichotomy*

Firstly, the classical peace/war dichotomy has lost its *raison d'être* with the outlawry of war and the blurring of the boundaries between conflict and peace. Traces of the historic distinction between war and peace are still present in some distinct areas of law (e.g., the effects of war on the law of treaties[33]). However, the applicability of law does not depend anymore on the recognition of a state of war or a state of peace. International law comes into play in situations which are neither declared war nor part of peacetime relations, such as threats to the peace. The most evident example is internal armed violence, which according to recent statistics forms 95% of armed violence in the last decade.[34]

Transitions from conflict to peace are governed by a conglomerate of rules and principles from different areas of law. International military forces, for instance, which are traditionally bound by wartime obligations may be bound to respect certain peacetime standards (such as *habeas corpus* guarantees), when exercising public authority in a post-conflict environment.[35] Civilian authorities, by contrast may invoke certain conflict-related exceptions from peacetime standards, in order to maintain orderly government.

Accordingly, there is no (more a) clear dividing line between war and peace. International law comes into play in processes of transition from one stage to the other, namely in transitions from conflict to peace or in transitions from to peace to conflict.

1.2.2 *International practice*

Secondly, and more importantly, one may witness the crystallization of certain rules and institutional frameworks for the organization of peace in international practice.[36]

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[32] Roberts views 'an emerging or future jus post bellum' as a basis to deal with shortcomings of *jus in bello*. See Roberts, *supra* n. 29, at p. 619. For a development of this argument, see Stahn, *supra* n. 2, at p. 921.

[33] See, *inter alia*, the project of the ILC on the effects of armed conflict on the law of treaties. For a survey of the work, see ILC, *Effects of armed conflicts on treaties*, at <http://untreaty.un.org/ilc/guide/1_10.htm>.

[34] See Human Security Report 2005, *The Changing Face of Global Violence*, at p. 18.

[35] See, e.g., the recommendations of the Parliamentary Assembly of the Council of Europe with respect to the international presence in Kosovo in Resolution 1417 (2005*), Protection of Human Rights in Kosovo*, at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1417.htm>.

[36] According to recent statistics, '[a]pproximately half of all the peace settlements negotiated between 1946 and 2003 have been signed since the end of the Cold War'. Empirical data suggest that the 'average number of conflicts terminated per year in the 1990s was more than twice the average of all

Most modern peace treaties are framed on the basis of the assumption that the ending of hostilities requires not only measures to terminate conflict (*conflict termination*) but active steps to build peace (*peace-making*).[37] This is reflected in the move from a negative to a positive conception of peace under the United Nations Charter, the peace-making practice of the Security Council after the revitalization of the collective security after the Cold War and practice in the field of development assistance (e.g., human rights and democracy clauses). In some contemporary documents, foreign nations have been deemed to hold a 'shared responsibility' for human security.[38]

Modern peace agreements regularly contain a large regulatory component, including numerous provisions on the organization of public authority and individual rights, such as provisions on transitional government, claims mechanisms, human rights clauses, provisions on demobilization, disarmament and reintegration, as well as provisions on individual accountability.

These regulatory norms are complemented by structures and institutional frameworks to foster compliance with legal obligations, including adjudicatory bodies and mechanisms of third-party monitoring.[39]

Peace-making has become an 'international affair'. Measures adopted by international authorities to ensure the re-establishment of war-torn territories or to assist in reconstruction are no longer considered as unlawful interventions in domestic affairs of states, but as steps facilitating the return from exception to normalcy.[40] States and international organizations have deployed various institutional models to facilitate the consolidation of peace, such as governance or assistance missions under the umbrella of peacekeeping, UN transitional administrations or multinational forms of administration.

The rise of human rights obligations and growing limitations on sovereignty and non-intervention have not only changed the attitude toward the ending of conflicts, but have also set certain benchmarks for behaviour. The process of peace-making itself has become a domain of international attention and regulatory

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previous decades from 1946 onwards'. See Human Security Report 2005, *The Changing Face of Global Violence*, at p. 153.

[37] See generally M. Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics', 6 *Tulane Journal of International and Comparative Law* (1998), p. 5. For a survey of contemporary treaties, see F.L. Israel (ed.), *Major Peace Treaties of Modern History 1980 – 2000*, Vol. VI (Philadelphia, Chelsea House, 2002).

[38] See Outcome Document of the 2005 World Summit, UN. Doc. A./60/L.1 of 15 September 2005, paras. 138-139.

[39] For a recent survey, see C. Bell, 'Peace agreements: Their Nature and Legal Status', 100 *AJIL* 2006, pp. 373-412.

[40] The UN and regional organizations have not only assisted in the reconstruction of war-torn-societies, but have shaped the legal and political foundations of domestic societies in cases such as Namibia, Cambodia, Eastern Slavonia, Kosovo, East Timor or Liberia. For a survey, see S. Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (Oxford, Oxford University Press 2004), pp. 126-152; R. Caplan, *International Governance of War-Torn Territories* (New York, Oxford University Press 2005), pp. 179-195. See also J. Dobbins et al., *The United Nations Role in Nation-Building: From the Congo to Iraq* (Santa Monica, CA, Rand Publishing 2005).

action. This is evidenced by the regulatory practice of the Security Council and the development of law and practice concerning the accountability of international organizations and peace support operations,[41] the extraterritorial application of human rights norms[42] or obligations of states in cases of state succession.[43] It is sometimes suggested that international organizations and states should be subject to comparable obligations in terms of immunity and accountability when exercising public authority.[44] Moreover, some of the grand strategies of peace-making (democratization, economic liberalization) are governed by a network of obligations, flowing from the law of international organizations, multilateral treaty commitments or donor conditionality.

It is therefore appropriate and timely to treat peace-making not only as a political process, but also a legal phenomenon.

1.2.3 *On the use of a jus post bellum*

This postulate is not reflected in the current architecture of international law. The contemporary law of armed force continues to be based on the traditional distinction between *jus ad bellum* and *jus in bello*. The process of peace-making after conflict is not reflected as a separate paradigm.[45]

An extension of the existing categories is not without risks. One of the dangers is that *post bellum* motives might be used as a pretext for validating of questionable uses of force. However, if properly construed, a *jus post bellum* may ultimately provide certain benefits.

1.2.3.1 Closing a normative gap

A *jus post bellum* might, first of all, fill a certain normative gap. At present, there is a considerable degree uncertainty about the applicable law, the interplay of differ-

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[41] See generally M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Martinus Nijhoff 2006).

[42] See, e.g., Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN. Doc. CCPR/C/74/CRP.4/Rev.6 of 21 April 2004, para. 10; T. Meron, *Extraterritoriality of Human Rights Treaties,* 89 *AJIL* (1995), p. 78.

[43] See, e.g., Human Rights Committee, *General Comment No. 26,* UN. Doc. A/53/40, Annex VII, para. 4.

[44] See, e.g., Ombudsperson Institution in Kosovo, *Special Report No. 1 on the Compatibility with recognized international standards of UNMIK Regulation No. 47/2000 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo* (18 August 2000); European Commission For Democracy Through Law, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, Opinion No. 280/2004 (11 October 2004); Council of Europe, *Protection of Human Rights in Kosovo*, Resolution 1417 (2005) (25 January 2005). For corresponding suggestions in legal doctrine, see F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 25 *Human Rights Quarterly* (2003), pp. 314 at 342.

[45] This omission may be criticized in light of the inherent link between recourse to force and restoration of peace. See Stahn, *supra* n. 2, at pp. 930-933.

ent structural frameworks as well as the possible space for interaction between different legal orders and bodies of law (international law v. domestic law, human rights law v. law of occupation, etc.) in a post-conflict environment. The articulation of a body of law after conflict may identify legal rules, which ought to be applied by international actors and clarify specific legal principles which serve as guidance in making legal policy choices in situations of transition.

1.2.3.2 Closing a systemic gap

Secondly, a re-thinking of the existing categories might serve a certain systemic function. The recognition of rules and principles of post-conflict peace would establish a closer link between the requirements of the use of force and post-conflict responsibilities in the context of intervention. Under a tripartite conception of armed force, including *jus ad bellum*, *jus in bello* and *jus post bellum*, international actors might be forced to consider to a broader extent the impact of their decisions on the post-conflict phase, including modalities and institutional frameworks for peacemaking, before making a determination whether to use of force.

The case for a *jus post bellum* is to some extent inherent in the conception of *jus ad bellum*.[46] Even under *jus ad bellum*, it is sometimes not enough to establish that the motives which lead up to the recourse to force pursue a lawful and commonly accepted purposes. A use of force in self-defense or under Chapter VII may have to be followed by action that is appropriate and capable of removing the threat that motivated the use of force by virtue of the principle of proportionality.[47] If it is clear at the outset that an invention will lead to a violent insurgency which may prevent the establishment of a just peace, the *jus post bellum* might provide an argument not resort to war in the first place.

Moreover, a *jus post bellum* might set certain legal constraints and guidelines for the exercise of public authority in a subsequent post-conflict engagement. It might provide the necessary parameters and benchmarks to determine whether the respective goals have been implemented in a fair and effective manner and in accordance with the law. An assessment of the *post bellum* record of an entity might further help distinguish political rhetoric from legitimate motivation in cases of intervention for humanitarian purposes.[48]

1.2.3.3 Reconfiguring jus in bello

Last but not least, the development of post-conflict law may have certain implications for the contemporary *jus in bello*. The move to a tripartite conception of the

[46] A similar argument is made in the context of just war theory, under which one of the criteria of the *jus ad bellum* is reasonable hope of success.

[47] Such an approach has recently been advocated by the High-Level Panel on Threats, Challenges and Change which established criteria for the authorization of interventions by the Security Council. See The Report of the High-Level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, para. 207.

[48] For a parallel argument, see F. Mégret, 'Jus in Bello and Jus Ad Bellum', in American Society of International Law, *Proceedings of the 100th Annual Meeting*, pp. 121 at 123.

law of armed force may, in particular, avoid an overburdening of the obligations of the military and temper the concerns of those who argue that the contemporary *jus in bello* is not meant to serve as a surrogate framework for governance in peacetime situations,[49] while preserving the interests of peace-making.

Considerations of fair and just peace would be part of the equation of armed force, however not under *jus in bello* in the proper sense, but under the law after conflict. These principles would have an indirect impact on the phase of armed conflict itself. Parties to an armed conflict would operate under a general obligation to conduct hostilities in a manner which does not preclude a fair and just peace settlement in the post-conflict phase.

2. The Scholarship Agenda

Although these considerations make it worthwhile to revive the idea of a *jus post bellum* in modern international law, the concept requires further refinement from a conceptual perspective. At least, three areas need further clarification if *jus post bellum* is taken seriously as a domain of scholarship, namely the general meaning of the concept, its content, and its operation.

2.1 **The meaning of the concept**

There is some agreement that the concept of *jus post bellum* is meant to address challenges of conflict termination and peace-making which are not covered by *jus ad bellum* or *jus in bello*. The notion has been defined in the Stanford Encyclopedia of Philosophy as a concept which that 'seeks to regulate the ending of wars and to ease the transition from war back to peace.'[50] However, until present the concept has still different meanings to different audiences.

2.1.1 *Foundation*

One of the dilemmas of the contemporary discourse over *jus post bellum* is the disregard and occasional misperception of the legal domain. This shortcoming has caused confusion about the foundation of *jus post bellum*.

2.1.1.1 Beyond morality

Jus post bellum has been mostly considered as a moral paradigm, namely as an extension of just war theory.[51] Part of the justification for this approach has been

[49] For such an argument, see M. Kelly, 'Iraq and the Law of Occupation: New Tests For an Old Law', 6 *YIHL* (2003), pp. 127 at 133.

[50] See Stanford Encyclopedia of Philosophy, *War,* sub. 2.3

[51] Proponents of the just war theory have used moral justifications to argue that a 'just war' requires 'a just peace'. See, *inter alia*, M. Walzer*, Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn. (New York, Basic Books 2000); B. Orend*, Michael Walzer on War and Justice*

derived from an assumed lack of legal rules. It has been argued that the issue of morality becomes so important because 'there is little international law here – save occupation law and perhaps the human rights treaties.'[52] The use of extra-legal parameters has thus been invoked as an argument to strengthen the case for moral reflection on intervention.[53]

This argument needs to be refined. A shift from law to morality is visible and defendable in areas where the parameters of law itself are in flux or under dispute, such as in the context of humanitarian intervention.[54] In this area, recourse to extra-legal justifications has even become an integral part of the vocabulary of international law. However, this does not mean that a potential *jus post bellum* must be exclusively of a moral nature.[55]

There some room to argue international law contains an existing pool of norms and principles, which goes beyond a moral responsibility after conflict.[56] The substantive components of peace-making are no longer exclusively determined by the discretion and contractual liberty of the warring factions, but are governed by certain norms and standards of international law derived from different fields of law and legal practice.[57] Some of these obligations are tied to factual considerations such as effective control, and are therefore partly beyond the will of states. This network of law and regulations may be deemed to form the foundations of '*jus*' in the legal sense, which complements the *jus post bellum* under the just war theory.

(Cardiff, University of Wales Press 2000). A similar type argument has been made in the context of nation-building in Iraq. See Feldman, *supra* n. 27, at p.3.

[52] See also Stanford Encyclopedia of Philosophy, *War,* sub. 2.3.

[53] See S.K. Sharma, *Reconsidering the Jus Ad Bellum/Jus in Bello Distinction*, Chapter 1 in this volume.

[54] International lawyers have used the legality/legitimacy distinction in the cases of Kosovo and Iraq in order to deal with the dilemma of unauthorized intervention. See T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge, Cambridge University Press 2002), pp. 174-191.

[55] Even moral philosophers occasionally combine ethical considerations with legal argumentation. See Orend, *Morality of War*, *supra* n. 3, pp. 204, 268.

[56] For a narrow vision, see however O. Godfrey*, The Concept of Jus Post Bellum in Humanitarian War: A Case Study of the Aftermath of the NATO Intervention in Kosovo*, at <www.bisa.ac.uk/2006/pps/godfrey.pdf>.

[57] The formation of peace settlements is governed by Art. 52 of the Vienna Convention on the Law of Treaties and considerations of procedural fairness; the limits of territorial dispute resolution are defined by the prohibition of annexation and the law of self-determination; the consequences of an act of aggression are, *inter alia*, determined by parameters of the law of state responsibility, Charter based considerations of proportionality and human rights based limitations on reparations; the exercise of foreign governance over territory is limited by principle of territorial sovereignty, the prohibition of 'trusteeship' (over UN members) under Art. 78 of the Charter, limits of occupation law under the Fourth Geneva Convention, as well as the powers of the Security Council under the Charter; the law applicable in a territory in transition is determined by the law of state succession as well certain provisions of human rights law (e.g., non-derogable human rights guarantees) and the laws of occupation; finally, the scope of individual criminal responsibility is defined by treaty-based and customary law-based prohibitions of international criminal law.

2.1.1.2 Law v. law

The current theorization of the concept suffers further from a fragmented and sector-specific vision of *jus post bellum* by legal scholars. The notion has been used to describe partially different legal paradigms. International humanitarian lawyers tend to view *jus post bellum* primarily as an alternative to the law of occupation, i.e., as a 'law of post-war reconstruction'. [58] Criminal lawyers would associate *jus post bellum* more closely with the concept of justice after war, and treat it primarily under the label of criminal accountability.[59] Human rights lawyers would regard it as a surrogate framework of law in situations of emergency.[60] Others again might view it as a nucleus of a 'responsibility to protect' after military intervention.[61]

This piecemeal approach is misguided. An area-specific vision of *jus post bellum* is neither in line with the historic tradition of the notion, nor helpful from a systemic point of view. It fails to address one of the principal dilemmas of contemporary international law, namely to define the interplay between different legal orders and bodies of law in situations of transition. It is more appropriate to understand *jus post bellum* in a holistic sense, namely as a broader regulatory framework, which contains not only substantive legal rules and principles governing transitions from conflict to peace, but also rules on their interplay and relationship in case of conflict.[62]

2.1.2 *Scope of application*

If *jus post bellum* is developed into a broader concept of law, it is further necessary to define its scope of application. It must, in particular, be specified in which circumstances *jus post bellum* comes into play.

According to its traditional understanding, *jus post bellum* is triggered by inter-state wars. Any modern perspective of this concept would be markedly different from that which occupied the minds of the scholars who first addressed this area. Today, the very notion itself is, to some extent, a misnomer. A modern *jus post*

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[58] See Boon, *supra* n. 2, at p. 285. See also Cohen, *supra* n. 2, p. 531 ('a coherent normative and legal framework […] for all occupations which can orient reform and provide clear limits to the legislative powers of occupiers').

[59] See Davida E. Kellog, 'Jus post bellum: the importance of war crimes trials', 32 *Parameters* (Autumn 2002), p. 93.

[60] In their treatment of *jus post bellum* R. Williams and D. Caldwell argue that '[a] just peace exists when the human rights of those involved in the war, on both sides, are more secure than they were before the war'. See *supra* n. 3, pp. 309-320.

[61] See Godfrey, *supra* n. 56.

[62] Sometimes, different legal provisions may conflict or compete with each other. For example, an immediate duty to prosecute may conflict with the parallel responsibility of the host state to protect the security of its people. The right of individual of access to the Court may conflict with the immunity of international organizations which exercise public authority in a post-conflict territory. Such conflicts must be solved by way of a hierarchy of norms or a balancing of principles. Some norms (e.g., *jus cogens* prohibitions) constitute 'hard' law ('rules'). They are applicable 'in an all-or nothing fashion'. Others are based on broader principles which may be balanced against each other.

bellum must apply after other events than classical wars. It would need to be connected to the broader notion of international armed conflicts and even certain kinds of interventions which are not directly contemplated by the *jus in bello* under the Geneva Conventions, such as enforcement action under Chapter VII of the Charter.[63]

In addition, a *jus post bellum* would have to apply in the aftermath of civil wars.[64] Internal armed violence is covered by the contemporary *jus in bello*[65] and have been the object of increased attention and regulation in the past decades.[66] A legal *jus post bellum* would thus need to embrace a *corpus* of rules of *jus post bellum internum,* which take into account the specificities of peace-making in internal armed conflicts.

At the same time, the temporal scope of application of *jus post bellum* must be redefined. Historically, the dividing line between war and peace has been the conclusion of a peace treaty.[67] Today, however, reality is in definitively more complex. A conflict can no longer be temporally defined simply by looking at the date of signature of the relevant peace treaty, nor will the conclusion of a peace treaty necessarily mean the definitive end of hostilities. The question of when a period can accurately be described as being 'after' hostilities may need to be determined on a case-by-case basis. *Jus post bellum* might, for instance, apply after a factual end of hostilities or after a Security Council Resolution.[68]

Greater flexibility is also required with respect to possible length of application. *Jus post bellum* is a law of transition by definition. This means that it must cease to apply at a certain moment. Traditionally, it has been argued that *jus post bellum* is aimed at the preservation or return to the legal *status quo ante*, which formed the logical endpoint of this concept. Today, however, such a vision is overly restrictive.

It may fit in some cases of an international armed conflict where State A has invaded State B and State B fights back. However, it is of little use in cases where the effects of the use of force make the restoration of the pre-war situation impossible. Moreover, the rationale of return to the *status quo ante* itself is misplaced in some contexts. If an intervention has been preceded by an internal armed

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[63] See also Roberts, *supra* n. 29, at p. 619 ('after a foreign military intervention').

[64] Ibid. ('after a war – whether civil or international').

[65] See Art. 3 Common to the Four Geneva Conventions of 12 August 1949 and Additional Protocol II of 1977.

[66] See ICTY, *Prosecutor* v. *Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 2 October 1995, para. 67 and 134. See also Art. 8(2) of the Statute of the International Criminal Court. For a survey, see F. Bugnion, 'Jus Ad Bellum, Jus in Bello and Non-International Armed Conflicts', 6 *YIHL* (2003), pp. 167-198.

[67] See L. Oppenheim, *International Law: A Treatise*, Vol. II, p. 472 ('[a]lthough occasionally war ends through simple cessation of hostilities … the most frequent end of war is a treaty of peace. Many writers correctly call a treaty of peace the normal mode of termination of war'.)

[68] Some scholars have pointed to Security Council Resolutions as being the 'substitute peace treaties' of recent times. See B. Fassbender, 'Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq', 13 *EJIL* (2002), pp. 273, 279.

conflict, it does not make sense to return to the situation that led to the conflict in the first place or to restore the social and political order that caused the humanitarian crisis. In these cases, the establishment of fair and just peace require positive transformations of the domestic order of a society, since peace settlement should ideally achieve a higher level of human rights protection, accountability and good governance than in the period before the resort to armed force.

A modern *jus post bellum* would be focused on the sustainability of peace, rather than on simply brokering an end to violence. This focus gives *jus post bellum* a dynamic scope of application. It might come to apply in situations which are in reality *in pacem* or *ante bellum.*

2.2 **The content**

The articulation of a legal *jus post bellum* requires further a refinement of its normative content. Currently, there are various synergies between just war theory and propositions by legal scholars. But there is no agreement on *canon* of *jus post bellum* principles.[69]

Moral philosophers have applied classical principles of just war theory, such as just cause, right intention, public declaration and legitimate authority, discrimination and proportionality, when defining *jus post bellum*. Brian Orend, for instance, offers the following principles: Proportionality and publicity of the peace settlement, rights vindication, distinction, punishment, compensation and rehabilitation.[70] Bass suggests that a *jus post bellum* should encompass, *inter alia*, the conduct of war crimes trials[71] , compensatory reparation[72] and the 'duty to respect to the greatest extent possible the sovereignty of the defeated nation and seek the consent of the defeated in any project for reconstruction',[73] which would require

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[69] See Orend, *The Morality of War*, *supra* n. 3, at pp. 180-181.

[70] See Orend, *War and International Justice, supra* n. 3, at pp. 232-233, id., *The Morality of War, supra* n. 3, pp. 180-181 ('1. Proportionality and Publicity. The peace settlement should be measured and reasonable, as well as publicly proclained […] In general, this rules out insistence on unconditional surrender 2. Rights Vindication. The settlement should secure those basic rights whose violation triggered the justified war. The relevant rights include human rights to life and liberty and community entitlements to territory and sovereignty […] 3. Discrimination. Distinction needs to be made between the leaders, the soldiers and the civilians in the defeated country […] 4. Punishment. When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes. […] Soldiers also commit war crimes. Justice after war requires that such soldiers, from all sides to the conflict, likewise be held accountable to investigation and possible trial. 6. Compensation. Financial restitution may be mandated, subject to both proportionality and discrimination. […] 7. Rehabilitation. The post-war environment provides a promising opportunity to reform decrepit institutions in an aggressor regime. Such reforms are permissible but they must be proportional to the degree of depravity in the regime. They may involve: demilitarization and disarmament; police and judicial re-training; human rights education; and even deep structural transformation towards a minimally just society governed by a legitimate regime […]').

[71] See Bass, *supra* n. 3, at p. 404.

[72] Ibid., at pp. 408-409.

[73] Ibid., at p. 392.

'that victorious states […] render themselves accountable to the population they purport to assist, seeking to gain their consent for the actions taken on their behalf.'[74] Michael Walzer proposed similar guidelines for a *jus post bellum* following the Iraq intervention. He noted:

> 'Democratic political theory, which plays a relatively small part in our arguments about *jus ad bellum* and *in bello*, provides the central principles of [post-war justice]. They include self-determination, popular legitimacy, civil rights, and the idea of a common good. We want wars to end with governments in power in the defeated states that are chosen by the people they rule—or, at least, recognized by them as legitimate—and that are visibly committed to the welfare of those same people (all of them). We want minorities protected against persecution, neighbouring states protected against aggression, the poorest of the people protected against destitution and starvation [...].'[75]

These general principles are not so far removed from rules and principles which may be derived from a survey of international practice, such as a requirement of fairness and inclusiveness of peace settlements; the exclusion of territorial mutilation as punishment for aggression; the humanization of reparations and sanctions; the distinction between collective responsibility and individual responsibility and accountability for mass crimes.[76]

However, they leave many questions unanswered. Firstly, the existing propositions continue to be shaped by just war theory which was developed on the basis of the criteria of classical warfare. *Jus post bellum* principles are thus focused on international armed conflicts. Internal armed conflicts are widely ignored.

Secondly, problems arise when these principles are translated into a more concrete context, such state- or nation-building. One may easily agree with the argument that principles of accountability, popular consent and closure (i.e., the sustainable assistance beyond the point of holding elections) should form part of any '*jus post bellum*' framework after intervention. Yet, it is doubtful to what extent there can be a 'blueprint' for transitions from conflict to peace.

Some proposals to that effect have been made in different contexts. It has been suggested to develop a model code of criminal procedure[77] or a toolkit to create 'government out of a box'.[78] Others have endeavoured to formulate a recipe to transform 'defeated rights violating aggressor regimes' into stable and peaceful societies, which would include strategies such as policing, capacity-building or the restoration of local ownership.[79]

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[74] Ibid., at p. 401.

[75] See M. Walzer, *supra* n. 28, 'Just and Unjust Occupation', para. 10.

[76] For a survey, see C. Stahn, *Jus ad Bellum – Jus in Bello … Jus Post Bellum: Towards a tripartite conception of armed conflict*, at <www.esil-sedi.eu/english/pdf/Stahn2.PDF>.

[77] See *Report of the Panel on United Nations Peace Operations* (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000, paras. 80-83.

[78] High-Level Workshop on State-Building and Strengthening of Civilian Administration in Post-Conflict Societies and Failed States, 21 June 2004, New York, *Government out of a Box – Some Ideas for Developing a Tool Box for Peace-Building.*

[79] See Orend, *The Morality of War*, *supra* n. 3, at p. 204.

Such efforts are guided by noble intentions, but over simplistic.[80] The individual situations differ, and so do the policies required to ensure sustainable peace. For examples, in some cases, a quick withdrawal of foreign troops may be best remedy to secure stability and fairness, while a prolonged military engagement may be desirable in other cases. Where some form of support and assistance in state building is requested or required in a specific situation, opinions differ greatly concerning the desirable strategy to be applied. Some authorities, such as Roland Paris, argue that institutionalization should generally come before liberalization and standard-setting in order to provide space for domestic dialogue about normative principles of a domestic polity.[81] Others suggest that action in specific sectors such as criminal justice and the rule of law should be prioritized immediately after conflict in order to put the process of peace building on the right track from the start.[82]

Thirdly, it is still unclear in existing literature from which sources such principles are and ought to be derived. In contemporary scholarship, moral or legal considerations (e.g., soft law) are often interwoven with policy assessments or recommendations. This turn to policy may be useful to develop best practices for certain actors (as done by UN-DPKO[83] or the World Bank,[84] for example), but it is shaky from a normative point of view. Some of the existing institutional frameworks and practices (e.g., UNMIK's and the OHR 'standards before status' practice[85]) do not necessarily lend themselves to further replication or elevation to normative rules or principles. Moreover, many of the facets and hidden side-effects of state building and reconstruction under international auspices are still unexplored.[86] More empirical research appears to be necessary, in order to identify reliable organizing principles for post-conflict peace.

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[80] See also the criticism voiced in the Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations of 20 October 2000, UN. Doc. A/55/502, para. 31 ('The group doubted whether it would be practical, or even desirable given the diversity of country specific legal traditions, for the Secretariat to elaborate a model criminal code, whether worldwide, regional, or civil or common-law based, for use by future transitional administration missions').

[81] See R. Paris, *At War's End: Building Peace After Conflict* (Cambridge, Cambridge University Press 2004), at p. 188.

[82] See S. Chesterman, 'Walking Softly in Afghanistan: The Future of UN State-Building', 44 *Survival* (2002), pp. 37-45.

[83] See DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit (December 2003).

[84] See K. Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learned*, Social Development Papers Conflict Prevention & Reconstruction, Paper No. 37, October 2006, at <http://www.siteresources.worldbank.org/.../244362-1164107274725/3182370-1164110717447/WP37.pdf?resourceurlname=WP37.pdf>.

[85] This policy raises some intriguing questions from the point of view of the right to self-government and political legitimacy. Do such benchmarks require prior domestic consent? Can compliance be assessed objectively? Do such policies ensure that the underlying norms and values are properly internalized in domestic society? For a critical analysis, see B. Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate', 16 *EJIL* (2005), p. 637.

[86] See D. Chandler, *Empire in Denial: The Politics of State-building* (London, Pluto Press Ltd. 2006); D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, Princeton University Press 2004).

2.3 Jus post bellum in operation

Last but not least, it is necessary to clarify the relationship between *jus post bellum* and *jus ad bellum* and *jus in bello*.

Here again, it is clear that the classical conceptions of 'just war theory' cannot simply be transposed to a legal setting. Just war theorists and international lawyers may agree with the general proposition that the idea of peace-making after war is, to some extent, rooted in *jus ad bellum*. However, both disciplines tend to have different point of departures concerning the application of the principle of distinction.

Philosophers have challenged the idea of the independence of the (moral) principles of *jus in bello* and *jus ad bellum*. The basic assumption of the principle of distinction, namely that the justification of the recourse to force (e.g., a just or unjust war) has no bearing on rights and obligations of combatants in war, has been questioned from a moral point of view. It has been argued that, as a matter of morality, it is 'simply not […] permissible to fight in a war with an unjust cause', since acts of war with an unjust cause cannot be proportionate or discriminate in terms of the harm that they inflict.[87] The same claim has been made with respect to *jus post bellum*. It has been argued that the '[f]ailure to meet *jus ad bellum* results in automatic failure to meet *jus in bello* and *jus post bellum*', and that from a moral point of view 'any serious defection, by an participant, from [the] principles of just war settlement should be seen as a violation of the rules of just war termination, and so should be punished.'[88] Or, as Orend put it more bluntly: 'Once you're an aggressor in war, everything is lost to you, morally.'[89]

Such an approach stands in opposition to the traditional stance of international lawyers who have fought for recognition of the principle of distinction over the past century. The general separation of *jus ad bellum* and *jus in bello* has become common ground in international law in the second half of the 20th century.[90] It is, *inter alia*, reflected in the separate codification of aggression and war crimes in the statutory instruments of international criminal tribunals[91] and the preamble to Additional Protocol I to the Geneva Conventions (relating to the Protection of Victims of International Armed Conflicts) which clarifies that the provisions of the Protocol apply in all circumstances without distinction based on the 'nature or origin' of the underlying conflict.[92] International lawyers would naturally plea for an

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[87] See J. McMahan, Morality, 'Law and the Relation Between Jus Ad Bellum and Jus in Bello', in American Society of International Law, *Proceedings of the 100th Annual Meeting* (2006), pp. 112 at 113.

[88] See Orend, *The Morality of War*, *supra* n. 3,at p. 162.

[89] Ibid.

[90] See C. Greenwood, 'The Relationship Between Ius ad Bellum and Ius in Bello', 9 *Revue of International Studies* (1983), p. 221; A. Bouvier, 'Assessing the Relationship between Jus in Bello and Jus ad Bellum: An 'Orthodox View'', in American Society of International Law, *Proceedings of the 100th Annual Meeting* (2006), pp. 109 at 110.

[91] See Art. 5 of the Statute of the International Criminal Court. Similarly, Art. 6 of the Nuremberg Charter distinguished 'crimes against peace' and 'war crimes'.

[92] See the fifth preambular paragraph of Additional Protocol I.

extension of the principle of distinction to *jus post bellum* arguing that the principal justification for distinguishing *jus ad bellum* and *jus in bello* applies equally with respect to idea of *jus post bellum*: Parties must end a dispute in a fair and just fashion irrespective of the cause of the resort to force. At the same time, principles of conflict termination apply independently of violations in the conduct of armed force. Such violations may even strengthen the need for fair and just peace-making (accountability, compensation, rehabilitation). The starting point of the legal discipline (i.e., the neutral application of *jus in bello*) is thus different from just war theory.

Nevertheless, even under contemporary international law, the separation of *jus ad bellum* and *jus in bello* is not an absolute rule. There is a certain convergence in the objectives of *jus ad bellum* and *jus in bello*. Both branches of law ultimately pursue a common rationale, namely to make war a less 'viable option' in international relations.[93] Moreover, the scope of application of the principle of distinction itself is limited in scope.

In some cases, it does not make sense at all to argue in terms of the principle of distinction. The operation of the classical principle of distinction is based on the assumption of the identity of parties to a conflict under *jus ad bellum* and *jus in bello*. Modern armed violence, however, is more complex. In the case of authorized collective security operations, it is doubtful whether there two parties in the classical sense of *jus in bello* in the first place.[94] Moreover, in many cases (Kosovo, Iraq), the actors involved on the post-conflict phase (e.g., UN civilian presences) are different from those who carried out armed force (e.g., NATO, a coalition of states). Such actors should equally come within the ambit of the operation of *jus post bellum* even though have not been parties to armed force.

Most importantly, like *jus ad bellum* and *jus in bello* are not fully independent,[95] *jus ad bellum* and *jus post bellum* cannot be entirely independent of each other. The application and interpretation of norms under one body of law may be informed by findings under the other. *Jus in bello*, for instance, contains an in-built reference to *jus ad bellum* in the definition of armed conflict in Article 1(4) of Additional Protocol I, which extends the applicability of the law governing international armed conflicts to 'armed conflicts which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.' A similar nexus exists between *jus ad bellum* and *jus post bellum*. The scope of legal obligations under *jus post bellum* may depend on whether or not an intervention was lawful. For example, a very different set of obligations may result in terms of reparation and individual criminal responsibility if armed force was used in aggressive war or in self-defense. Even in the legal discipline, *jus post bellum* is thus not an entirely autonomous branch of law.

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[93] See also Mégret, *supra* n. 48, at p. 123.

[94] Accordingly, UN peacekeepers are only bound to observe 'fundamental principles and rules of international humanitarian law' under para. 1. of the UN Secretary-General's Bulletin, ST/SGB/1999/13 of 6 August 1999.

[95] For a discussion of challenges to the distinction, see Bouvier, *supra* n. 90, p. 111; Mégret, *supra* n. 48, p. 121.

3. Conclusion

The concept of *jus post bellum* has gained new attention in contemporary scholarship. But its current theorization is still unsatisfactory in several respects. The concept is praised as a promising instrument to enhance the sustainability of peace after conflict, but it is often presented in a one-sided fashion and defined without consideration of related disciplines. This vision should be revisited. At least two factors require further attention.

The first element is the general lack of attention to the legal dimensions of *jus post bellum*. The concept itself emerged in the tradition of just war theory, but it has been widely ignored in the legal discipline. This gap may explained by some structural grounds which are rooted in the development of international law in the 20th century, but it is increasingly open to challenge from a normative point of view. The exclusive reference to moral obligations in the theorization of transitions from conflict to peace fails to recognize the existing net of legal rules and principles in this area. Contemporary developments suggest that it is time to take the concept of *jus post bellum* seriously as a legal paradigm, both in the context of just war theory and within the legal community.

Secondly, there is a certain tendency in contemporary scholarship to conflate or misconstrue the mutual roles of law and morality. The fact that a legal *jus post bellum* may be traced back to a historical tradition does not mean that the classical moral and the legal paradigm must be identical. Moral theory and legal science share distinct origins and rationales and approach the relationship between *jus ad bellum*, *jus in bellum* and *jus post bellum* from different angles. Moral philosophy is primarily concerned with the moral justification of warfare, under which the operation of the principles of *jus ad bellum*, *jus in bello* and *jus post bellum* is closely connected to the overall (just or injust) cause of the recourse to force. International lawyers, by contrast, tend to view each of these categories as autonomous rules of behaviour, with the aim of maximizing compliance and respect for human dignity. It is therefore not contradictory to construe *jus post bellum* differently in each discipline.

Nevertheless, the conceptual development of *jus post bellum* requires more inter-disciplinary discourse. Scholars from different communities would benefit from a closer look at related disciplines. Some of the current (mis-)perceptions of the role of moral parameters in the theorization of *jus post bellum* might be adjusted, if just war theorists paid greater attention to the impact of legal rules and principles. Conversely, the legal discipline may draw valuable insights from the content of the classical *jus post bellum* under just war doctrine and historical sources when defining the contours of *jus post bellum* in modern international law.

Part II
CONTEMPORARY CHALLENGES OF A JUS POST BELLUM

Chapter 6
CHALLENGES OF POST-CONFLICT INTERCESSION: THREE ISSUES IN INTERNATIONAL POLITICS

Michael Pugh*

Abstract
This essay contends that debates about post-bellum law should be part and parcel of wider debates about the purpose and role of peace-building according to norms of the liberal peace. The first challenge, and central to these debates, is the issue of sovereignty and, in particular, the emergence of shared sovereignty as a way of overcoming weaknesses in 'failed' and post-bellum states. But the sovereignty acquired by the external actors for institution building does not invariably serve the purposes of establishing political sovereignty in post-bellum societies. A second challenge, rule of law, an institutional suite much vaunted by proponents of liberal peace as essential to good governance and statehood also requires unpacking for its limitations in addressing symptoms of unrest. Finally, a third challenge, that of distributive justice, particularly access of war-torn societies to employment, is examined in order to illustrate the gap between the normative values of the liberal peace framework and the limited ability of populations to make claims for accountability.

Introduction

The perspective in this article derives from international politics rather than international law, but it highlights dimensions of *post-bellum* politics particularly relevant to law scholars, namely: sovereignty; law and order; and distributive justice. It contends that although legal developments and implementation of the law may contribute to formulating and formalizing norms, regarding practices in political economy for example, the fundamental and paradigmatic frameworks of intercession in war-torn societies by external actors requires interrogation. The legal debates should be part and parcel of wider debates about the purpose and role of peace-building. Shared sovereignty, the conception of the rule of law and norms of political economy form part of the liberal peace framework for recovery in war-torn societies, and their limitations will be explored in turn.

The term intercession needs explanation. Although, agencies introduced from outside to run countries may have good cause to bring prayers with them, the label is used here to dignify a gamut of activities in war-torn societies, from currency reform to refugee return, that are often backed by the presence of force, but

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can be distinguished from intervention with military force *per se*, and may have the consent of disputants.

To begin with, the concept of *post bellum* that framed former UN Secretary-General Boutros Boutros-Ghali's proposals for post-conflict peace-building in *An Agenda for Peace* (1992) glossed over the issue of partial peace and fluid war-to-peace environments. Cessation of violence in some parts of a territory may not be matched elsewhere, as is evident in Afghanistan in the warlike conditions of Helmand Province during 2006-2007. From an international politics perspective, the challenge is largely to ascertain whether a local legal authority exists, how far it extends and whether it can co-exist with the legal priorities of the intercession. Lessons learned from the practices of international agencies and organizations may provide useful guidance in this respect. For example, the UN's concept of 'integrated missions' may contribute to mitigating the deleterious impacts of varied mandates, agendas and accountabilities of diverse agencies engaged in peace-building. Lessons from past practice, however, are not readily transferred from one context to another. What works best in East Timor will not necessarily apply in Afghanistan. Moreover, the solving of operational problems that preoccupy agencies provides little room for reflection on the fundamental issues of what peace means and the purposes served by peace-building. The location of sovereignty is particularly pertinent to such a debate.

1. The Challenge of Sovereignty

Sovereignty is a multifaceted political construction that has been reconstituted as shared sovereignty by peace-building operations. This preserves the ideal of the state as an externally recognized, legal entity with the potential to act as sovereign in the international system. But this article shows that the conception and practice is problematic, and that it involves a conflation of intervention with force and intercession to transform systems of governance. From an international politics perspective, legal provisions protecting states from intervention are less a definitive attribute of state sovereignty than part of the construction of statism and inter-state order that has taken various forms and been endowed with different meanings in specific historical contexts. As Brierly remarks, sovereignty is not so much an essence of statehood as a collection of claims that states make in their relations with each other.[1]

The challenge of state sovereignty, understood here as claims to the constitutive independence of a political community, loomed large in the study of peace missions in the period after WW II. In period of assertive independence from occupation and colonialism it was considered necessary to demonstrate that these missions did nothing to undermine the distinctive legal principle of non-intervention

[1] J.L. Brierly, *The Law of Nations*, 6th edn. (New York, Waldock 1963), at p. 47. For the normative conceptualization of state sovereignty, see T.J. Biersteker and C. Weber, *State Sovereignty as a Social Construct* (Cambridge, Cambridge University Press 1996).

(except in the event of a threat to, or breach of, the peace), that the UN Charter and UN declarations (notably in 1965), upheld.[2] Thus it could be argued by Alan James, a pioneer of peacekeeping studies, that UN peacekeeping derived from Article 40 of the Charter, regarding 'provisional measures [that] shall be without prejudice to the rights, claims, or position of the parties concerned', and did not contravene state sovereignty since it contested neither domestic jurisdiction nor external recognition. Host consent was such a critical variable in the deployment of peacekeepers that state sovereignty could remain intact, indeed underpinned by visa and transit arrangements, restrictive status of forces agreements and memoranda of understanding.[3] In Weberian terms, it is true that the state would temporarily cede its monopoly of force by allowing foreign-commanded troops on its territory, albeit with restrictive rules of engagement. However, consent could always be withdrawn, as Egypt did with respect to UNEF in May 1967. Secretary-General Dag Hammarskjöld contended unsuccessfully that the Egyptian government had limited its unilateral powers by agreeing to host the force until its mandate was completed.[4]

State sovereignty as the independent constitution of a community could continue to be presented as absolute and indivisible because it was distinct from government apparatus and the exercise of autonomy. In re-articulations since the 1990s sovereignty seems to have been merged, perhaps confused, with political capacity and autonomy (the ability to exercise jurisdiction and make decisions without reference to external variables).[5] Moreover, sovereignty debates intensified, not simply because of global processes of international and domestic integration and increasingly intensive negotiation between international and domestic law,[6] but also because several states were deemed to be weak or failed.[7] Within the so-

[2] 'Every State has an inalienable right to choose its political, economic, social and cultural system, without interference in any form by another State.' Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and their Independence and Sovereignty (1965), GA Res. 2131, 20th Sess., Supp. No. 14, UN Doc. A/6014(5).

[3] A. James, 'The Practice of Sovereign Statehood in Contemporary International Society', 47 *Political Studies* (1999), pp. 462-464; Id., *Peacekeeping in International Politics* (London, Macmillan for International Institute for Strategic Studies 1990); Id., 'Peacekeeping, Peace-enforcement and National Sovereignty', in R. Thakur and C. Thayer (eds.), *A Crisis of Expectations: UN Peacekeeping in the 1990s* (Boulder, CO, Westview Press 1995) p. 263. Whereas Iraq refused consent for the presence of victorious western troops in the Northern Iraq in 1991, it gave formal consent to the presence of UN guards. N.D. White, *Keeping the Peace: the United Nations and the maintenance of international peace and security* (Manchester, Manchester University Press 1993), at p. 61.

[4] See White, *supra* n. 3, at p. 232.

[5] This built on the view that state sovereignty entails membership of a society of nations that confers legitimacy and produces norms of behaviour as well as customary and treaty law. Sovereignty could thus be made conditional on conformity to rules, including humane treatment of a population: 'one might hypothesize that nations obey rules of the community of states because they thereby manifest their membership in that community, which in turn, validates their statehood', T. Franck, *The Power of Legitimacy Among Nations* (New York, Oxford University Press 1990), at p. 8.

[6] See P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London, Penguin Books Ltd 2005), at pp. xvi-xvii.

[7] W. Zartman (ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder, CO, Lynne Rienner 1995). Zartman defines it as a situation where the structure, authority, law and political order have fallen apart and must be reconstituted in some form, old or new; states collapse when they can no longer perform 'the functions required of them to pass as states', at p. 9.

called English school of international relations, for example, Jackson, argues that quasi-statehood in the 'Third World' diminishes the capacity of governments to act on sovereignty (which he calls negative sovereignty). From this pluralist stance, however, the discriminations in sovereignty did not provide a basis for general exceptions to the non-intervention rule that protected international order.[8] On the other hand, solidarists, such as Wheeler, seek to transform international order by following an ethical compass that points to denial of governmental sovereignty, even without UN legitimation.[9] Sovereignty is then judged to warrant resurrection not only through the application of force to bring peace, but also through state-building, nation building and institution building. On the other hand, 'strong' government in those states that were deemed to be rogues (such as Iraq under the Ba'ath Party and Afghanistan under the Taliban) have to be weakened and even invaded to save the state through regime change. These contradictory impulses not only demonstrate the contingent and normative nature of sovereignty but also raise the question of whether states should be reconstructed at all, and whether problems lie in an idealized vision of the state as a legal construct.[10]

It is also arguable that the debate has deepened further in the past five years because cardinal goals of intervention and peace-building have not been working particularly well, or have taken far longer than anticipated. In some cases, peace itself remains disputed; in others, constitutions arising from peace generate discontent; and in others democratization stalls and neo-liberal policies of economic growth make little difference to poverty and the role of crime. What Mark Duffield refers to as 'the liberal peace' has appeared to lack responsiveness among, or accountability to, indigenous communities that would foster a notion of political sovereignty that signifies the ability of people to negotiate among themselves how the sovereignty associated with governance is determined.[11] Consequently, commentators who re-examine the implementation of policies refer to an apparent lack of coordination among peace-building agencies, and partly answer this problem with the concept of integrated missions.[12] The flawed implementation case is also underpinned by critiques of host elites (sometimes entire populations) as corrupt, incompetent and underdeveloped, thereby absolving the interveners of imperfection in their assumptions and performance.

Sovereignty is contingent on certain forms of behaviour by governments (their dependence on conventional weapons alone, human rights observance and 'good governance'). Weak and failed states, or strong states made weak by regime

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[8] R. Jackson, *Quasi-states: Sovereignty, International Relations and the Third* World (Cambridge, Cambridge University Press 1990).

[9] N.J. Wheeler, Saving Strangers. Humanitarian Intervention in International Society (Oxford, Oxford University Press 2000).

[10] L. Cliffe and R. Luckham, 'Complex Political Emergencies and the State: Failure and the Fate of the State', 20(1) *Third World Quarterly* (1999), p. 27.

[11] M. Duffield, *Global Governance and the New Wars* (London, Zed Books 2001).

[12] E.B. Eide, A.T. Kaspersen, R. Kent and K. von Hippel, *Report on Integrated Missions,* (2005) Independent Study for the Expanded UN ECHA Core Group, at <ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1003352>.

change, are to be relieved of this sovereignty and accorded – in Stephen Krasner's phraseology – 'shared sovereignty'.[13] For Paul Collier, an analyst of post-conflict situations, this is imperative because conflict risks are asymmetrical: 'Most of the costs of conflict are for neighbours and the wider community. And so we can't allow sovereignty. We have rights.'[14] It is not clear what 'we' refers to here, but the comment was made to an audience that comprised mainly private investors and proponents of good governance. Such audiences and their aid provision, it is argued, have been co-opted into ambitious projects of socio-economic transformation that reconfigure not only governance but also political sovereignty on the grounds that a population lacks fitness for statehood.[15]

The role of the liberal peace project has been to construct a form of administrative power akin to trusteeship to make people and government fit for statehood. As Zaum points out, territories thus administered are set normative tests of responsible sovereignty by international actors, in order to qualify for international legitimacy.[16] But this conception of sovereignty has tended to reproduce Jackson's quasi-state: recognized state sovereignty in the international system (with a degree of implicit recognition in the case of Kosovo), but without coherence in reconnecting state, government and people. State-building projects have met resistance or lacked sustainability not merely on account of maverick domestic spoilers or a paucity of administrative skills.

On the contrary, according to commentators who re-examine the normative assumptions of peace-building, contend that the liberal peace project has lacked secure political foundations in war-torn societies. The liberal peace provides constitutional forms to establish political sovereignty but without secure political roots, thereby denying the liberal conception of the social contract. This contradiction has been accompanied by a shift in the discourse of sovereignty in the international system. In particular, David Chandler identifies a shift from the debate over competing rights – the right to intervene versus the right of non-intervention – to the rights of victims and the responsibilities of states and the 'international community' to protect individuals and communities from abuse.[17] Marked by the report of the Independent Commission on Intervention and State Sovereignty (2001), which stressed that although primary responsibility lay with states, their sovereignty could coexist with international intervention to protect because sovereignty now meant a state's accountability to the 'community of responsible states' as well as to its own

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[13] S.D. Krasner, 'The Case for Shared Sovereignty', 16(1) *Journal of Democracy* (2005), p. 69.

[14] P. Collier, 'Private Sector Development and Peacebuilding', conference organized by GTZ, DFID and International Alert, Federal Ministry of Foreign Affairs, Berlin, 14–15 September 2006 (text transcribed from a keynote address recording at <www.businessenvironment.org/dyn/be/besearch.details?p_phase_id=108&p_lang=en&p_phase_type_id=6>.

[15] T. Jacoby, 'Hegemony, Modernisation and Post-War Reconstruction', in R. McGinty and O.P. Richmond (eds.), *The Liberal Peace and Post-war Reconstruction* (forthcoming).

[16] D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford, Oxford University Press 2007).

[17] D. Chandler, 'Imposing the Liberal Peace', in A.J. Bellamy and Paul Williams (eds.), *Peace Operations and Global Order* (London, Routledge 2005) at pp. 64-66.

population.[18] The concept of 'partnership' in repairing the state meant that the accountability of local partners participating in reconstruction flows outwards to external agencies. In Chandler's view, institutional and administrative capacity building was highly ambiguous because the underlying goal of the external partners was 'not to create independent, autonomous, self-governing entities' and restore a Westphalian sovereignty, but to avoid responsibility for the exercise of power – a denial of empire.[19] The construction of international administrative power is privileged over domestic political processes, thereby relocating the political sovereignty of governing to an external accountability. Shared governance in *post-bellum* conditions thus disguises a dual impact on sovereignty: the evasion of responsibility for power by the external agencies and an attenuation of the ability of states to govern themselves.

Perhaps, therefore, the lesson from this debate is that one of the main challenges confronting legal opinion concerning *post-bellum* environments is to understand the paradoxes of shared sovereignty and its tenuous connection with the political sovereignty of those immediately affected by its application.

2. Rule of Law

The ability of states to provide rule of law is also a prime attribute of sovereignty in the Weberian sense, along with a monopoly of force. In so far as this provision is in the hands of external actors, legal sovereignty is administered rather than organically coherent. Given the breakdown of formal law in war-torn societies, the provision of legal frameworks, institutions and guardians, rule of law is a key aspect of building state sovereignty. However, rule of law also has multifaceted, politically charged meanings. In the liberal peace project it is usually conceived as a body of constitutionally arranged legal provisions implemented in accordance with legal process (including review procedures), applying equally to government and governed alike. As Mani indicates, however, there is tension between, on the one hand, positivist conceptions that rule of law has an a-moral function to bring order and, on the other, natural law conceptions that attach access to, and guarantees of rights, justice and freedoms to the need for discipline.[20] Rule of law in liberal peacebuilding intercession tends also to focus on technical capacity and reforming legislation, institutions, the effects of past injustice and improving the commercial environment. It has also become a prominent slogan for the kind of 'good governance' on which jurisdictional competence and sovereignty has been made contingent. It has become a panacea for security, development and human rights problems. In political hands the normative requirements sometimes emerge as platitudes. For

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[18] See, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background* (2001), at p. 11.

[19] D. Chandler, *Empire in Denial: the politics of state-building* (London, Pluto 2006), at pp. 26-47.

[20] R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, Polity 2002), at pp. 25-29.

instance, Lord Ashdown's seven principles of *post-bellum* peace operations, begins with 'having a good plan and sticking to it', and is immediately followed by:

> 'the overriding priority – as we have discovered in Bosnia, Kosovo, Afghanistan and now Iraq – of establishing the rule of law as quickly as possible. Crime and corruption follow swiftly in the footsteps of war, like a deadly virus. And if the rule of law is not established very swiftly, it does not take long before criminality infects every corner of its host. This above all, was the mistake we made in Bosnia. We took six years to understand that the rule of law should have been the first thing. We are paying the price for that still.'[21]

Ashdown's commentary can be unpacked to reveal an interesting discourse of power and norms for achieving sovereignty.

First, 'rule of law' seems to have replaced 'security first' as the priority in peace-building. Of course, rule of law may be integral to physical security, but it may also mean suspension of the application of specific human rights provisions, to enable security forces to shoot looters and resisters on sight, for instance. Inhabitants, on the other hand, might well consider that physical security is more important than an impartial judiciary. A *partial* judiciary might indeed make sections of the population feel more secure.

Second, the use of 'we' four times in this extract establishes the very dichotomy that Chandler criticizes as politically neutered sovereignty, fostering the assumption that the (undefined) 'we' know best and 'we' pay the price when the 'Other' resists – though 'our' superiority in this respect is somewhat challenged by the socially constructive role of informal law in non-western societies and the fact that outsiders take a long time to learn lessons.[22]

Third, the medical metaphor of infection and virus is very common in depicting war-torn environments and places where poverty is rife. It conjures up the idea that this complex issue can be cured clinically by the application of science. The metaphor thereby oversimplifies the problem. It also insinuates that unless treated, the disease will be part of the price that the external actors could pay by becoming infected themselves. A false mutual vulnerability is thereby established, though the populations at risk from destruction, abuse, disease, displacement and impoverishment are clearly those *in situ* and in the vicinity of conflict.

Fourth, it is also a discourse of discipline, predicated on the notion that crime and corruption are prevalent in war-torn societies because of incompetence. It is an unruliness that has to be controlled from the outside, even though outsiders do not themselves necessarily conform to rules of international law and claim privileges and legal exemptions while conducting themselves in war torn societies.

The slogans are problematic representations of the rule of law in interesting respects. First, 'crime and corruption' needs to be disaggregated to elicit the

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[21] P. Ashdown, 'Identifying Common Themes and Key Factors in Post-conflict Reconstruction Processes', in *Beyond Cold Peace: Strategies for Economic Reconstruction and Post-conflict Management. Conference Report* (Berlin, 27-28 October 2004), Berlin: Federal Foreign Office, at pp. 39-40.

[22] B. Pouligny, *Peacekeeping Seen from Below* (London, Hurst 2006).

meanings and references it has for the populations concerned as well as for academics and policy-makers. It can range from high level mafia-organized trafficking, to failure to declare the employment of people in order to avoid paying employment tax. It may characterize the activities of a political elite that has to be co-opted into sustaining a peace process. It is entirely possible that the external assistance missions get to know who the political godfathers of crime are, but can only pursue small fry for political reasons.[23] Moreover, the absence of viable alternatives may mean that some forms of crime are essential for survival. An estimated 85% of the Bosnian population was sustained by shadow activity during the war,[24] and that was hardly likely to disappear afterwards. Although in the longer term the requirements of state-building revenue will mean that shadow activity has to be squeezed, with 18% of Bosnians living in extreme poverty in 2006 and macro-economic austerity being introduced from outside, people continue to depend on shadow activity.

In this regard the issue of macro-economic policy cannot be dodged. If macro-economic polices introduced by external actors have the effect of adding to unemployment and impoverishment then continued reliance on informal economies and extra-legal or illegal activities for welfare is to be expected.[25] Balakrishnan Rajagopal points out that critical legal literature:

> 'has posited that legal and illegal norms and institutions are often deeply intertwined with each other, in a process wherein one could see the state as very much involved in the production of illegality while illegal norms and processes shape the very structures of the state itself …. [and further, that] a call for rule of law in the context of plural legal orders is often a call for the assertion of the superiority of state law over non-state law, through the coercive power of the state to achieve particular outcomes that favor some.'[26]

The distribution of property rights is an obvious example, in which 'rule of law' may be artificially constructed to favour war profiteers.

Second, 'crime and corruption', however defined, does not simply follow war. It features in war, often to fuel conflict as well as to make personal fortunes, it may be a continuation of pre-war habits and customary practice. Indeed, there is a school of thought contending that, like war, 'crime' has long been a development practice and a constituent of state-building.[27] States have been founded on piracy.

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[23] The author's fieldwork in Bosnia suggests that this is indeed the situation, which can be deduced when cases come to court, though evidence concerning knowledge of the 'godfathers' is undocumented.

[24] X. Bougarel, *Bosnie: Anatomie d'un conflit* [*Bosnia: Anatomy of a Conflict*] (Paris, La Découverte 1996), at p. 125.

[25] The political economy of the liberal peace is discussed at length in M. Pugh, N. Cooper and J. Goodhand, *War Economies in a Regional Context* (Boulder, CO, Lynne Rienner 2004).

[26] B. Rajagopal, 'Rule of Law in Security, Development and Human Rights: International Discourses, Institutional Responses', in A. Hurwitz (ed.), *Rule of Law in Conflict Management: Security, Development and Human Rights in the 21st Century* (Boulder, CO, Lynne Rienner 2007).

[27] For a stimulating discussion of the role of conflict in development, see C. Cramer, *Civil War is Not a Stupid Thing: Accounting for Violence in Developing Countries* (London, Hurst 2006).

Obviously, a significant difference today is the rich matrix of domestic and international laws and norms and the glare of modern media. Nevertheless, the historical record indicates that the point in modern societies at which such primitive accumulation is less tolerated occurs when certain practices become socially unacceptable and when a social contract between state and people is underwritten by the governing authorities abiding by new rules and taking responsibility for the provision of widely held economic benefits. Baldly stated, there seems to be a limited rationale, for a young woman trying to survive, to contribute to government revenues if the authorities then use part of its aggregate income to reward corrupt cronies *and* at the same time tries to cut maternity leave, as has happened in Bosnia. Clinical prescriptions for the eradication of crime as a disease are therefore misplaced.

Third, the orthodox view fails to account for the connections between external and local actors in the production of illegality. The consequences of economic intervention often include the reinforcement of interlocking government and business, and the siphoning off of privatized public assets into private pockets. The introduction of privatization, for example, creates a context for asset stripping, bargain sales and fraudulent dealings. Entrepreneurs in south-east Europe have secured the spoils of peace by transferring a clientalistic system into post-conflict political economies, and by accommodating the conditionality imposed by external 'protectors' within the processes of privatization and deregulation. It is less a case of foreign carpetbaggers replacing local elites than internal–external economic coexistence. Widespread incidence of illegal profiteering and large-scale fraud by foreign companies and *post bellum* local leaders has also been a prominent feature of Iraq.[28]

Fourth, the financial value of criminality in war-torn and poor communities is perhaps outmatched on a global scale beside the fraudulence of 'crony capitalism' and in some of those countries instilling discipline in war-torn societies. Certainly, the role of shadow activity contributes a high proportion of economic activity in war-torn societies compared to more advanced economies in the North. The poppy economy of Afghanistan constitutes about 52% of GDP, generates US $2.3 billion and is the most dynamic economic sector with opium processing now increasing inside the country.[29] But in such spotlights we should also be reminded of VAT carrousel fraud, the illegal diversion of billions from poor to wealthy countries and political corruption 'epidemics' in several northern countries.[30] This is not, of course, a reason to be insouciant about rule of law in *post-bellum* environ-

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[28] E. Herring and G. Rangwala, *Iraq in Fragments: The Occupation and its Legacy* (London, Hurst 2006). The symbiotic relationship between capitalism and crime is examined in M. Pugh, 'Postwar Political Economy in Bosnia and Herzegovina: the Spoils of Peace', 6 *Global Governance* (2002), p. 467; Id., 'Crime and Capitalism in Kosovo', in T.B. Knudsen and C.B. Laustsen (eds.), *Kosovo between War and Peace* (London, Routledge 2005), p. 116.

[29] B.R. Rubin, *Road to Ruin: Afghanistan's Booming Opium Industry*, (2004) Center for American Progress / Center on International Cooperation, New York, 7 October 2004, at <http://www.cic.nyu.edu/afghanistan/reconstruction.html>.

[30] R.W. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Capitalist System* (New Jersey, Hoboken, John Wiley & Sons 2005).

ments. But it is pertinent to note that the term is capable of disparate meanings and is vulnerable to overloading. As Balakrishnan remarks:

> 'there is a consensus that state failure or failure of governance is the root of all the problems …. [which] has in turn led to a focus on rule of law as a way of rebuilding or strengthening the state. But using the rule of law as a way to build up states does not resolve many problems that are very much a part of the relationship between the disparate agendas of development, security and human rights.'[31]

Excessive reliance on law and policing to reconstruct government sovereignty is a challenge under conditions of shared sovereignty, especially as the agendas of external actors are themselves unaccountable to the population. There is thus a need to balance rule of law with accountability (though accountability is hardly a legal expression), and with what is perceived to be just not only by the external actors but by host communities.

Finally, an issue, addressed, *inter alia*, by Carsten Stahn, Ralph Wilde and Matteo Tondini, concerns justiciability for 'internationals', especially in cases of shared responsibility and where, for example, the degree of control exercised by the UN over member states is unclear or disputed. It seems from the work of these legal scholars that there could be an implied responsibility for offences arising when international organizations agree to act as *de facto* administrations because state apparatus has collapsed.[32] It might be presumed that an international body that sustains a legal regime should be held accountable in respect of the violations of that regime by its personnel effectively controlling areas and populations.[33] In practice the protection of privileges and immunities of missions and their personnel is secured through denial of jurisdiction, the discretionary interpretations of mandates and the idea that international organizations are not like states directly administering a society but reside some Olympian distance from the domestic realm.[34] The preservation of immunities at international and domestic level cannot be divorced from the political origins of the dispensations that grant a kind of trustee status. In the pseudo-state of Kosovo (its international legal personality not qualifying it for quasi-statehood), KFOR's right to impose executive detention, supervised only by agreements for third-party inspection of facilities, seems to have existed by virtue of NATO's conquest. Although the Council of Europe's Commissioner for Human Rights has argued that in UN administrations legal and political responsibility lies

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[31] Rajagopal, *supra* n. 26.

[32] C. Stahn, 'Accountability and Legitimacy in Practice – Lawmaking by Transitional Administrations', (2005) ESIL Research Forum on International Law: Contemporary Issues, Graduate Institute of International Studies, Geneva, 26-28 May; Id., 'Justice Under Transitional Administration: Contours and Critique of a Paradigm', 27 *Houston Journal Int'l Law* (2005), p. 311.

[33] A lawsuit was registered against the Dutch Government in February 2007 in relation to the Srebrenica massacre.

[34] R. Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor', 7 *ILSA J Int'l & Comp. L.* (2001), p. 458; M. Tondini, see Chapter 10 in this volume.

with the Secretary-General's Special Representative as head of the administration, the absence of any appellate mechanisms to challenge his or her decisions is a serious issue.[35] UNMIK has exercised exclusive control and regulation over economic policy and personnel, and over public and socially-owned property and enterprises. Moreover, the constitutional framework for Kosovo specified that the Special Representative would decide the parameters of budgetary and monetary policy.

Providing remedies for citizens and domestic authorities claiming injury is thus problematic when defendants are directly employed by an international agency, which claims immunity. To illustrate this, the activities of Joly Dixon in south-east Europe merit consideration. Director, International Economic and Finance Matters, Directorate General II of the European Commission, Dixon was in charge of Kosovo's privatization programme, which he pursued with great diligence, reportedly being keen to sell off enterprises at a rate of 20 a week.[36] His *White Paper* on Enterprise Development Strategy ran into opposition from the unions and some Kosovar economists, as well as from Serbia and the UN Security Council. When Russia complained that changes to property rights were an infringement of sovereignty, Dixon, responded that UNMIK and not the Security Council would decide the details for administering Kosovo.[37] The privatization strategy in Kosovo ran into difficulties and was suspended in 2003 because international officials were not sure of being covered by immunity.[38] Dixon subsequently transferred to Bosnia where, as Chair of the Board of the new Indirect Tax Authority, he supervised the working of a new unitary VAT system, replacing the former variable sales tax.[39] Dixon was accused of deciding, without consulting the Indirect Tax Authority Board, on a distribution of VAT proceeds that the Republika Srpska (RS) authorities claimed had deprived of up to € 20 million in income in 2005. The RS Prime Minister, Milorad Dodik filed a lawsuit in a domestic court, still pending, on suspicion that Dixon had abused his office, falsified official documents, and allegedly damaged the economy – this last delict open to prosecution through a law that the international community had insisted upon. Dixon, however, reportedly claimed immunity, with backing from the EU.[40]

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[35] Tondini cites: CoE 16 October 2002, Kosovo : The Human Rights Situation and the Fate of Persons Displaced From Their Homes, CommDH(2002)11, <www.coe.int/Defaulten.asp>, sec. V 1(2).

[36] Interview with J. Dixon, *Koha Ditore* [Priština], 2002, p. 11 at <www.unmikonline.org/press/mon/lmm200200.html>.

[37] Interview, *supra*; 'Analysis: Kosovo investment – an acceptable risk?', *Reuters* report, Priština, 18 June 2000 <www.UNMIKonline.org/press/wire/im190600.html>.

[38] B. Knoll, 'From Benchmarking To Final Status? Kosovo And The Problem Of An International Administration's Open-Ended Mandate', 16 *EJIL* (2005), at pp. 654-655; M. Tondini, 'The privatization system in Kosovo: Rising towards an uncertain future', Pristina, December 2003 <www.osservatoriobalcani.org/filemanager/download/37/Privatization%20SystemPDF.pdf>.

[39] On EU insistence, the Bosnians were denied the advantage of variable rates that would have hit luxuries hard but spared essentials (such as bread, educational materials and medicine), a dispensation permitted in virtually every member state of the EU.

[40] N. Diklić, 'Board Chair Dixon; Dodik: RS lost KM 40 million due to some "ITA omissions" ... We are going to sue Joly Dixon', *Nezavisne Novine* (Banja Luka), 6 March 2006, p. 5; 'B-H Prosecutor's

As Tondini points out, it seems rare for regional and other supervisory bodies to contemplate action involving international organizations, or even member states conducting measures on behalf of those organizations. But the possibility of locating concurrent responsibility (and thus judicial liability before either human rights regional bodies or domestic courts) with state participants in international policing and administration is perhaps the most promising avenue, which could open the way to a more comprehensive political and legal response to the issue.[41]

3. Distributive Justice

Within the normative framework of tests for statehood elucidated by Zaum, distributive justice under international guidance are be neglected, though economic causes of conflict are widely acknowledged.[42] The normative tests of political economy tend to be established by economists who arrive in war-torn societies exercising forms of algebraic necromancy impenetrable to other mortals, disqualifying, marginalizing and subjugating other forms of knowledge. Certainly, the economic technicians of international financial institutions (IFIs) are never far from the centres of power in war-torn societies, and they are joined by others from the 'international community' of aid agencies and peace-building missions which frame the construction of economic discourse and practice. Indeed, it is arguable that shared sovereignty is barely disguised macro-economic conditionality for receipt of assistance in the tradition of discredited structural adjustment programmes. For example, at both the Dayton and Rambouillet talks economic norms were nailed firmly to mast of intercession, and integrated into the constitutional arrangements for both BiH and Kosovo.[43] In effect the economic future was mapped out under the control of the external powers.

Office investigating Joly Dixon pursuant to RS lawsuit', *Nezavisne Novine*, 2 June 2006. Informally, revelations of international malpractice can be met by arrogant responses. *Dnevni Avaz* (Sarajevo), 15 June 2007, 'OHR employees were stealing from BiH for months through significant reduction of telephone costs', pp. 1, 9.

[41] A regional commander of the Kosovo Protection Corps, was arrested and detained by KFOR for abuses committed against fellow Albanian Kosovars who were perceived to have collaborated with Serbs. His sentence was exceeded by the period he had already spent in detention, and his conviction was quashed by the Supreme Court. He brought a lawsuit against KFOR to the Strasbourg court against individual states under European human rights law. The three states concerned, and six others, observed that the territorial principle applied, and that no single state had jurisdiction over KFOR actions. UN legal opinion also indicated that the European court's scrutiny could harm the establishment of peace operations. The episode is analyzed in Tondini, Chapter 10 in this volume. See also, H.H. Perritt, 'Providing Judicial Review for Decisions by Political Trustees', 15 *Duke J. Comp. & Int'l L* (2004), p. 1.

[42] R. Mani, *supra* n. 20, at pp. 126-157; Sands, *supra* n. 6, at pp. 95-142.

[43] In Annex 4 of the Dayton accords, the BiH Constitution seeks 'general welfare and economic growth through the protection of private property and the promotion of a market economy'. In the Rambouillet document, Chapter 4, Economic Issues, Art. 1(1) stated that 'the economy of Kosovo shall function in accordance with free-market principles'. This normative principle was subsequently included in the constitutional framework.

The framing of post-conflict political economies for war-torn societies has closely followed develop-mentalist models for promoting macroeconomic discipline, private business and global integration. Although the Washington consensus that informed early transformation projects has been declared dead and been replaced by more nuanced approaches to foster poverty reduction and social protection, a potential reformist consensus was disrupted by the United States at the UN New York summit of September 2005. Even so, the 'pro-poor' reformism itself remained within the terms of debate and practice that springs from epistemologies of liberal and neo-liberal capitalism.[44]

Perhaps the most radical neo-liberal revolution had already occurred in the 'peace stabilization' that followed the victor's peace in Iraq. Here, Paul Bremer, US head of the Coalition Administration in the first half of 2003, pursued a vision of economic development that swept aside existing forms of production, exchange and regulation. Bremer's single-minded pursuit of deregulation, foreign direct investment, privatization (including privatization of the privatization process), and anti-protectionism was so severely disruptive and punitive for the most vulnerable sections of society that it had to be abandoned.[45] United States post-victory policies also prepared fertile ground for corruption and gross overcharging for services, while public services sank into a dire state.[46]

Research findings on the transformation of war economies at the University of Bradford indicate that key issues in distributive justice that would stimulate a sense of social contract get suppressed in the quest for macroeconomic stability. First, the stimulation of labour markets is a neglected challenge. Unemployment is high in *post-bellum* environments and employment is a high priority for populations in war-torn societies (a close runner-up to physical security and property restitution). Yet employment has a lesser priority for economic advisers and foreign and domestic investors. Reducing unemployment is often made heavily contingent on creating a 'rule of law climate' for private business, on which a great deal rests to achieve growth and employment.

In Bosnia, the OHR's agenda specified reforms that would liberate the market from inflexible rules and red tape in order to encourage investment that would create jobs. Some 60,000 new jobs were anticipated to emerge from deregulation and foreign investment, instead of which the formal labour market had shrunk by 2007 to the point that 57% of the active population had withdrawn from it.[47] The programme thus relied heavily on indirect effects of the operation of mar-

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[44] M. Pugh, 'The Political Economy of Peacebuilding: a critical theory perspective', 10 *International Journal of Peace Studies* (2005), p. 23.

[45] N. Klein, *No War: America's Real Business in Iraq* (London, Gibson Square Books 2005); W. Lacher, 'Iraq: Exception to, or Epitome of, Contemporary Post-Conflict Reconstruction?', 14 *International Peacekeeping* (2007); Herring and Rangwala, *supra* n. 28.

[46] A deception perpetrated by some international companies and agencies is to overstate the local salary costs to funders and auditors but pay out only a fraction. Dispatches, Iraq's Missing Billions, GuardianFilms, Channel 4, UK broadcast 20 March 2006, 8pm.

[47] UNDP, *Social Inclusion in Bosnia and Herzegovina, National Human development Report, 2007*, Sarajevo, 2007, at p. 75.

ket forces, rather than direct invention and an employment policy. The programme's authors even denied that the state could create jobs, conveniently forgetting that their own salaries were paid by states or intergovernmental institutions.[48] Labour flexibility and retraining is clearly a major problem for employers,[49] but the burden of transition falls heavily on those made redundant as a result of economic rationalization. As a means to improve market performance in transition countries generally, the International Labour Organization promotes the concept of 'flexicurity' in labour markets – security and protection harnessed to labour flexibility.[50] But flexicurity assumes symmetry of market power, in which the aggregate effect of labour–capital negotiation is a balance between work flexibility and income protection. In war-torn societies, however, labour is left with very little protection at all. In Bosnia for instance, people can only register as unemployed if they were previously registered as employed, so they will pay someone to be officially employed for a month. Perhaps as much effort could be spent on developing employment policies as is spent on organizing privatization and encouraging foreign direct investment.[51]

Second, abuse of labour rights is prevalent. The successor states to Federal Yugoslavia incorporated the International Labour Office conventions into domestic law, but in practice employers, whether in the formal or informal economy, delay paying wages, pay them in part, or do not pay them at all before dismissing workers on spurious grounds.[52] International agencies largely ignore the abuse and as employers of local labour often commit abuse as well. Not until the EU signed up to labour rights in 2005 did other internationals, including the OHR, follow suit. At the very least, donors who use public funds to help businesses seek profits ought to regulate and track the employment practices of entrepreneurs whose rational economic management strategies include the exploitation of labour in conditions of high unemployment. Social protection is also necessary to make allies of workers who are in a position to 'blow the whistle' on economic malpractice.

Third, it would be erroneous to assume that there is a mutually exclusive clash of values between the external actors and the domestic population on economic issues. As mentioned earlier, external economic experts and domestic elites can achieve a reciprocal understanding on issues such as the privatization of public assets. The establishment of reliable trading conditions depends on the establish-

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[48] OHR (Office of the High Representative) (2002), 'Jobs and Justice: Our Agenda', at p. 5 <www.ohr.int/pic/econ-rol-targets/pdf/jobs-and-justice.pdf>.

[49] See generally, F. Caušević, *Foreign trade Policy and Trade Balance of Bosnia and Herzegovina* (Sarajevo, Economic Institute 2006).

[50] See, S. Cazes and A. Nesporova, *Labour Markets in Transition: Balancing Flexibility and Security in Central and Eastern Europe* (Geneva, ILO 2003).

[51] See important suggestions by: M. Shone, 'Labour-based Infrastructure Rebuilding', in E. Date-Bah, *Jobs after war: A critical challenge in the peace and reconstruction puzzle* (Geneva, ILO 2003), at pp. 243-258; F. Chigunta, 'The Creation of Job/Work Opportunities and Income Generating Activities for Youth in Post-Conflict Countries', (2006) paper at an Expert Group Meeting on Youth in Africa: Participation of Youth as Partners in Peace and Development in Post-Conflict Countries, 14 to 16 November, Windhoek, Namibia <www.un.org/esa/socdev/unyin/documents/namibia_chigunta.pdf>.

[52] Base on personal field research questionnaire, June – September 2006.

ment of commercial law that gives confidence to trading parties dealing outside non-traditional forms of exchange. Also, aspirations for a 'western' consumerist lifestyle are to be found in all sectors. But improving the business environment does not ineluctably improve social distribution. The poor do not benefit from policies of self-reliance and the privatization of basic needs. Nor does persistent neglect of the public sphere improve social coherence or secure loyalty to institutions and authorities. Instead it can produce gross inequalities and gated enclaves of economic activity that are divorced from the social life of communities.

Fourth, alternative imaginings of the war-torn economy may entail protection, at least for a time, from the most damaging socio-economic effects of integration with global markets. Historically, free trade was not the preferred option of *post-bellum* economies in the developed world, and there remain variations of government direction, public provision, ownership and support, ranging from Japan's planning mechanisms to the UK's expensive support for defense exports. In *post-bellum* environments production needs to be stimulated (for instance by liberalizing imports of equipment and materials essential to increase productivity in enterprises such as agriculture). There is an argument, also, for temporarily tightening regulations and duties on finished products that could be produced locally, is how governments and 'international trustees' might support production (especially in agriculture), temporary protection, new infrastructures and meeting local demands through import substitution, credit or a system of concessionary bond issues.

In conclusion, the sharing of sovereignty has a prohibitive impact on economic choice and therefore of democracy. One of the key challenges for distributive justice applied to war-torn societies is the contemplation of alternatives to reification of individualistic *homo economicus*, and perhaps ascription to an 'effective collectivist narrative that runs against the grain of the imagined economies of globalization.'[53]

4. Conclusion

In their international relations, 'failed states' and war-torn societies betray low resistance to intervention and post-conflict intercession, even though as states they make claims of formal sovereignty. Rwanda did not cease to have independent constitution as an entity while it was in turmoil. However, the contingent and flexible concept of sovereignty allows privileged and powerful external agents to introduce norms into war-torn societies that purport to foster statehood by constructing legitimized and accountable institutions that can then claim political sovereignty and legitimacy in the international system. This not only requires leaps of faith, and maybe prayer, in the ability of external agents to 're-normalize' societies so that they meet liberal yardsticks of sovereignty, such as rule of law, the hazards of con-

[53] A. Cameron and R. Palan, *The Imagined Economies of Globalisation* (London, Sage 2004), p. 161.

ceptualizing sovereignty as something to be shared are revealed in the suppression of self-determination, not least on issues of political economy. Hence, political accountability may be directed externally, in international administrations in particular. Moreover, the norms are assumed to reflect a strong impulsion towards universalities that define state legitimacy, even though selective application of the norms is safeguarded. The United States does not expect Saudi Arabia, China and Cuba to sit a common legitimate sovereignty exam.

Finally, one can detect a juncture in the pursuit of a liberal peace. Solidarist views of 'the responsibility to protect' may continue to dominate the framing of peace operations and intercessions. The UN's Peace-building Commission testifies to the importance that the liberal framework maintains in international discourse and practice. Similarly, the apparently influential bipartisan Princeton strategy project, *Forging a World of Liberty under Law*, published in September 2006 reflects a strong Wilsonian vision of a global order based on the spread of liberal democracy.[54] Hailed as an impressive retreat from the polarizing visions of the Bush administration, and heralding a return to multilateralism,[55] the thinking behind the *Liberty under Law* strategy can be considered as the latest manifestation of the liberal peace, in which rogues, spoilers, victims and incompetents have to be administered to protect peace. Certainly, the strategy bids to fuse 'hard' and 'soft power' with diminished reliance on military solutions and a rediscovery of international law by the United States. But it also proposes a permanent, US-led 'Concert of Democracies' to help create a better and safer world. The document as a whole can be read either as a triumph for pragmatic retreat from overstretch or further evidence of a denial of empire: the 'planners' of global blueprints have had to reexamine their assumptions. On the other hand, *Liberty under Law* clearly retains the idealistic and visionary rhetoric of engineering the world in a liberal image.

Alternatively, and in the light of bruising experiences in Iraq and Afghanistan, where *post-bellum* environments are elusive, the norm purveyors may have to give way to approaches that scale back visions and allow more limited ambitions to hold sway. If the liberal view of conditional sovereignty is revealed as a fantasy or based on a flawed, perhaps meaningless, vision of transformation, then aggressive shared sovereignty is itself in crisis.

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[54] G.J. Ikenberry and A-M. Slaughter (eds.), *Forging A World Of Liberty Under Law: U.S. National Security in the 21st Century* (2006), at <http://www.wws.princeton.edu/ppns/report/FinalReport.pdf>.

[55] See T.G. Ash, 'This marks the beginning of an end – and the end of a beginning', *The Guardian* (London), 9 November 2006, p. 31.

Chapter 7
FROM INTERVENTION TO LOCAL OWNERSHIP: REBUILDING A JUST AND SUSTAINABLE RULE OF LAW AFTER CONFLICT

Annika Hansen* and Sharon Wiharta**

Abstract
While the challenges of rule of law reform are increasingly well-understood, the question of how to bring about and consolidate change that is suitable to and sustainable by a given society has not been satisfactorily addressed. Local ownership is acknowledged as crucial to effective peace-building but there has been little exploration of what this means in practice for international efforts in post-conflict situations. Similarly, a jus post bellum will have to be flexible enough to take local preferences and sensibilities into account. At the same time, jus post bellum will likely cease to be applicable, when local ownership over laws and legislature has been realized. The article introduces the debate on local ownership, differentiates among different groups of local actors and identifies key dilemmas that hamper the implementation of local ownership. It further looks at the implications these factors have for the viability and practicality of a jus post bellum.

Introduction

The link between the rule of law and conflict[1] has increasingly become the centre of international attention and post-conflict interventions now routinely feature mandates that call for rule of law reform[2] to bolster state capacity and thereby prevent

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[1] This article has been written in connection with the FFI/SIPRI project on Transition to a Just Order. The project has produced a Policy Report and a Practitioners' Guide on the subject of how to implement the principle of local ownership in the context of rule of law reform and a longer volume that delves more deeply into the conceptual discussion and includes four case studies (Afghanistan, Balkans, Timor-Leste and West Africa). The present article is a condensed version of the conceptual discussions on local ownership. See A. Hansen and S. Wiharta, *The Transition to a Just Order: Establishing Local Ownership after Conflict* (Research Report, Stockholm, Folke Bernadotte Academy, 2007), at <http://www.folkebernadotteacademy.se/roach/images/pdf/Transition%20to%20a%20Just%20Order%20Policy.pdf>.

[2] Rule of law reform encompasses a number of elements that reflect the procedural and the normative dimensions of the rule of law, as it is defined in the UN Secretary-General's report on *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616 (New York, United Nations 2004). The main elements are legal reform, institution and capacity building in the security sector and developing a rule of law culture among all local owners, i.e., an understanding,

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future lapses in human rights protection and breakdowns in the rule of law. Similarly, the possibility of designing a *jus post bellum* – to bridge a legal and a justice gap by providing principles that can govern peace-making in a post-conflict situation – has arisen with a shift in the international legal system toward providing 'a normative order'. While the understanding of the challenges of rule of law reform has evolved significantly in the past fifteen years – both in academic writing and in policy development, the question of how to bring about and consolidate change that is suitable to and sustainable by a given society has not been satisfactorily addressed. The popular response, reflected in a variety of policy documents issued by international institutions and national donor agencies, has been to advocate local ownership and tailor-made solutions, but there has been little exploration of what this entails in practice. As a *jus post bellum* runs the risk of not being flexible enough to take account of peculiarities, local ownership becomes central to ensuring the validity of such a body of law. At the same time, the transition to local ownership is likely to mark the end point of the applicability of *jus post bellum*.

Jus post bellum can be a starting-point and/or an umbrella for the law reform efforts that are an important part of institution building. According to Vivienne O'Connor,

> '[m]uch of the focus of law reform efforts in the context of peace operations has been on improving the substantive quality of domestic laws – police laws, criminal laws, criminal procedure laws, civil laws, property law and family laws – and ensuring that they are compliant with international human rights norms and standards.'[3]

Local ownership, in turn, is both process and outcome of institution building. It is an outcome in that local capacity and local institutions are the means to sustain the rule of law. But local ownership must also be seen as a process that determines the outcome, in order to ensure that local capacity and institutions are appropriate for the society in question.[4] Two other areas that *jus post bellum* may address and in which the principle of local ownership plays a central role, are meeting demands for transitional justice and the interplay of international and domestic law. The latter also touches on the question of how international actors can be held accountable.

This article takes a first step towards better understanding the challenges involved in implementing the notion of local ownership. It does so by introducing the debate on the principle of local ownership and attempts to clarify the concept by

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appreciation and confidence in the rule of law and the willingness to submit to being governed by the rule of law.

[3] V. O'Connor, 'Rule of Law and Human Rights Protections through Criminal Law Reform: Model Codes for Post-conflict Criminal Justice', 13 *International Peacekeeping* (2006), pp. 517 at 521.

[4] A.S. Hansen, 'Building Local Capacity for Maintaining Public Security', in A. Ebnöther and P. Fluri (eds.), *After Intervention: Public Security in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (Geneva, Geneva Centre for the Democratic Control of the Armed Forces (DCAF) 2005) pp. 293 at 295.

differentiating among different groups of local owners. It outlines the dilemmas that beset the implementation of the concept and considers likely limitations to ownership and traditional rule of law mechanisms in criminalized, corrupt or biased environments. Ultimately, the overarching dilemma that is likely to beset efforts to develop a *jus post bellum* concerns the need to marry international normative requirements of rights and values and local preferences – which may not prioritize rights in the same manner or may not discernibly correspond with Western models of how rights should be manifested and enforced.

1. A Closer Look at Local Ownership

1.1 The local ownership debate

The notion of local ownership is controversial. While it surfaces in most official policy documents, such as guide the work of Department for International Development (DFID), the OECD or the UN, critics argue that the term is too vague to be meaningful and that the concept is naive and impracticable, as there would be no need for international involvement, if the 'local owners' had not failed in the first place.

Having originated in the context of development assistance, the concept of local ownership evolved against the background of a focus on state-building and experiences in peace-building missions.[5] The development towards greater international authority in transitional societies arose with the recognition that the underlying political concerns rather than the symptoms of a conflict would have to be addressed to consolidate peace. Moreover, in her discussion on international authority to enact a *jus post bellum*, Kristen Boon argues that there is an obligation to promote the rights and values enshrined in the body of international law that has been adopted since WW II.[6] Also, due to the fact that the local governments were not representative, weak or dysfunctional, the international intervention assumed greater responsibility.[7] But even in a period in which international intervention has become ever more comprehensive and intrusive, there is a growing recognition that these interventions have to grow local roots to ultimately be successful. In addition, the principle of local ownership has a practical starting-point in that the international effort is almost always limited due to a lack of resources; manpower, funds and not least due to a limited attention span. Therefore, the sooner responsibility can transition to less transient stakeholders the better.

Critics disagree with an unqualified call for local ownership. Simon Chesterman argues that 'it is both inaccurate and counter-productive to assert that

[5] For more on the origins of the concept, see S. Chesterman, 'Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations', 1 *Journal of Intervention and Statebuilding* (2007), pp. 3-26.

[6] K. Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', 50 *McGill Law Journal* (2005), pp. 3 at 16.

[7] J. Chopra and T. Hohe, 'Participatory Intervention', 10 *Global Governance* (2004), pp. 289 at 290.

transitional administration depends upon the consent or "ownership" of local populations.'[8] And Richard Caplan has suggested that results have been 'unsatisfactory' where international operations have relied on local parties.[9] As proponents of a strong international role, Chesterman submits that local conditions necessitate a temporary override and Michael Dziedzic maintains 'that local police forces are often incapable of restoring public order, participate in the violence, or threaten the international intervention force.'[10] Chesterman points to a tension in the international approach to state-building and describes it as a

> 'mix of idealism and realism: the idealist project that a people can be saved from themselves through education, economic incentives, and the space to develop mature political institutions; the realist basis for that project in what is ultimately military occupation.'[11]

The quote reflects how the new intrusive interventions and the state-building tasks that they entail have been compared to colonial experiences and the possibility of setting aside local ownership through trusteeships.[12] Being so closely associated with the emergence of an international normative order, an accusation of neo-colonialism might also be levied against proposals for the development of a *jus post bellum*, unless it can incorporate local preferences and is demonstrably temporary, i.e., has a clearly defined end point. Boon addresses this tension by juxtaposing the terms 'trusteeship' – international actors promoting what they think local owners *should* want – and 'accountability' – promoting what local owners actually *do* want – as two principles of justice to guide a *jus post bellum*. She suggests that a third principle of 'proportionality' can help to determine the appropriate middleground between these two extremes.[13]

Proponents of local ownership, on the other hand, have underlined the limitations of reforms that are imposed by external actors and a number of cases have demonstrated that changes that lack local footing are not viable. Tschirgi points out that international actors have demonstrated a 'chronic inability […] to adapt their assistance to the political dynamics of the war-torn societies they seek to support.'[14] This is true also for other areas, but especially so for reform of the rule of law,

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[8] S. Chesterman, *You, the People. The United Nations, Transitional Administration, and State-Building* (Oxford, Oxford University Press 2003) p. 3.

[9] R. Caplan, *A New Trusteeship? The International Administration of War-torn Territories* (Adelphi Paper No. 341, London, International Institute for Strategic Studies 2002).

[10] Cited in R.M. Perito, *Where is the Lone Ranger When We Need Him? America's search for a Postconflict Stability Force* (Washington D.C., United States Institute for Peace) p. 35.

[11] Chesterman, *supra* n. 8, p. 1.

[12] R. Paris, 'International peacebuilding and the 'mission civilisatrice'', 2002 *Review of International Studies* (2002), pp. 637 at 650 et seq.; J.D. Fearon and D.D. Laitin, 'Neotrusteeship and the Problem of Weak States', 28 *International Security* (2004), pp. 5 at 12.

[13] Boon, *supra* n. 6, pp. 10-13, 38.

[14] N. Tschirgi, *Post-conflict Peacebuilding Revisited: Achievements, Limitations, Challenges* (New York, International Peace Academy 2004) p. i. See also R. Paris, 'Peacebuilding and the Limits of Liberal Interventionism', 22 *International Security* (1997), pp. 54 at 54.

because it is a profoundly political enterprise: at its core, it is about altering the nature of the social contract between the individual and the state.[15] The argument in favour of local ownership is two-fold: First, it has a practical dimension that focuses on the chances for success and suggests that if the reform process is to be legitimate and sustainable it must build on existing judicial systems and legal traditions, where possible, and reflect the culture and values of the country in question, even as it affirms international law, norms and standards. Second, the argument for local ownership can also be made based on the legal concepts of sovereignty and self-determination that need to have a central place in a *jus post bellum*.[16]

Meaningful consultations with and participation of local actors to establish objectives and priorities and to assess progress are needed if law reform is to enjoy substantial political and popular support. Bosnia-Herzegovina provides a clear example of the legitimacy of the rule of law reform process being brought into question by the way in which it has been implemented by external actors. Some argue that the powers of the Office of the High Representative (OHR) to introduce legislation, and the way these have been used to dictate the priorities of reform, undermine the very same democratic principles which the international community claims to promote.[17] But ownership is also important for the functioning of the rule of law, in that police and judicial institutions are dependent on active cooperation and communication with the general public. This is both a question of effectiveness and responsiveness, as well as of relevance and legitimacy.

Regardless of conceptual misgivings and criticism of implementation, local ownership has been mainstreamed as a central objective and necessary condition for successful peace-building at the policy level. In the aftermath of the extensive international interventions in Kosovo and Timor-Leste, Lakhdar Brahimi strongly promoted local ownership in an approach commonly known as the 'light footprint'. Given Brahimi's own involvement in planning the international intervention in Afghanistan, it is not surprising that the 'light footprint' was used as the guiding principle. Put simply, it entailed that an operation should focus on building capacity and 'rely on as limited an international presence and as many [local] staff as possible.'[18]

Other international policy documents have also embraced the principle of local ownership. The World Bank stressed the principle in its Proposal for a Comprehensive Planning Framework in 1999.[19] Similarly, the Development Assistance Committee (DAC) of the OECD defined a number of principles for assistance to security sector reform which highlight the need to incorporate local perceptions of threats to public security, to strengthen civilian oversight and accountability and to

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[15] S. Rose-Ackerman, 'Establishing the rule of law', in R.I. Rotberg (ed.), *When States Fail. Causes and Consequences* (Princeton, Princeton University Press 2004) pp. 182 at 182.

[16] Boon, *supra* n. 6, p. 37.

[17] R. Dwan and S. Wiharta, 'Multilateral peace missions: Challenges of peacebulding', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Stockholm, Stockholm International Peace Research Institute (SIPRI) 2005); G. Knaus and F. Martin, 'Lessons from Bosnia-Herzegovina: Travails of the European Raj', 14 *Journal of Democracy* (2003), pp. 60 at 60.

[18] See Chesterman, *supra* n. 8, at pp. 89-92.

[19] Cited in Chesterman, *supra* n. 5, p. 8.

build local institutions and capacity.[20] In a study of community-based peace-building, International Alert suggests nine principles that emphasize local ownership and should guide donor support:

> 'i) acknowledging the primacy of people affected in transforming conflict, ii) motivated by humanitarian concern, iii) informed by existing human rights and humanitarian law, iv) respecting gender and cultural diversity, v) engaging in an impartial manner, vi) ensuring independence from political agendas, vii) being accountable to the key stakeholders, viii) building sustainable partnerships, ix) investing in institutional learning'. [21]

Challenges to the view that rule of law reform must be built on local ownership focus on who is being empowered and question the intentions of those empowered, arguing that a premature and ill-considered implementation of local ownership merely reinforces the established legal order and power structures, which may have been a source of grievance in the first place.[22] Underlying principles that have been suggested for a *jus post bellum* correspond with this line of thinking by insisting that peace-making activities cannot aim at re-establishing the *status quo ante*, i.e., conditions in which 'war was deemed justified and initiated'.[23] Richard P. DiMeglio even argues that there is an inherent obligation to tackle the underlying structural causes of the conflict, as it

> 'is of little practical value and disproportionate to the cost of lives and resources expended to permit a nation to justly engage in war and successfully terminate a conflict, yet allow conditions to remain that permit violence and aggression to again erupt.'[24]

Simon Chesterman considers the 'light footprint' approach untenable in that it depends on the political willingness of the local actors and their ability to even formulate political preferences, which may well be non-existent in post-conflict or collapsed state setting.[25] Others, such as Stephen D. Krasner, have tried to formulate a middle ground. In a discussion on the potential of sharing sovereignty, he underlined the importance of asserting formal local authority, but opened for international role where local capacity is insufficient or driven by more or less sinister motives:

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[20] DAC/OECD, *Security Sector Reform and Governance* (DAC Guidelines and Reference Series, Paris, OECD 2005) pp. 22-23.

[21] International Alert, 'Supporting and Enhancing Community-based Peacebuilding', *Global Issues Policy Notes No. 1* (2002, <http://www.reliefweb.int/rw/lib.nsf/db900SID/DPAL-5Y7LMB/$FILE/Supporting_Enhancing_Communitybased_Peacebuilding_No1.pdf?OpenElement>).

[22] E.G. Jensen and T.C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Palo Alto, Stanford University Press 2003).

[23] R.P. DiMeglio, 'The Evolution of the Just War Tradition: Defining Jus Post Bellum,' 186 *Military Law Review* (2005). pp. 116 at 138.

[24] DiMeglio, *supra* n. 23, pp. 146, 147 et seq., 150.

[25] Chesterman, *supra* n. 8, p. 4.

> 'Left to their own devices, collapsed and badly governed states will not fix themselves because they have limited administrative capacity, not least with regard to maintaining internal security […]. [D]ecent and effective domestic sovereignty [is impossible], because the autochthonous political incentives facing political leaders in many failed, failing or occupied states are perverse. These leaders are better able to enhance their own power and wealth by making exclusionist ethnic appeals or undermining even the limited legal routinized administrative capacity that might otherwise be available.'[26]

Another way to approach local ownership is to consider the degrees of authority that local actors exercise. Local ownership can range from local acceptance or tolerance to local control over decision-making. Different degrees of authority will be required and desirable at different stages and in various areas of a reform process. While it may be counterproductive or unfeasible to insist on local decision-making at an initial stage, local authority should increase in the course of a reform process. Boon's principle of proportionality and her discussion on the limits to the authority that international actors can legitimately exercise indicates a similar point of view.[27]

Reflecting the distinction between process and outcome, local ownership has been defined in different ways. The OECD sees its practical implication as 'a participatory framework through which the needs and views of all stakeholders can be articulated and addressed.'[28] This is in line with Simon Chesterman's distinction between local ownership in a process and as an outcome.[29] He argues that although local ownership of the security sector and the rule of law is a valid final goal, local ownership in the process of reform faces severe difficulties. Others have pointed out that local ownership is related to outcomes – creating accountability for both positive and negative results – and that local ownership should ultimately mean that governments have internalized the reform process to such an extent that they are prepared to defend it to their domestic constituencies.[30] For the population at large, ownership of security sector reform means recognition that the process is of concern to them and that the population has some measure of say in forming the outcome of the process.

The author hold the view that (i) the maximum authority possible – in accordance with available local capacity, context and mechanisms to hold authorities accountable – should be allocated to local owners at any given time; and (ii) a minimum of popular and political acceptance is indispensable for all stages of the transition to gain a foothold and be consolidated. In a case where there is strong popular and political opposition to a rule of law reform, there is no place for an international effort in this area.

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[26] S.D. Krasner, 'Sharing Sovereignty. New Institutions for Collapsed and Failing States', 29 *International Security* (2004), pp. 85 at 86, 89, 98.

[27] Boon, *supra* n. 6, pp. 7 et seq.

[28] Quoted in E. Scheye and G. Peake, 'To arrest insecurity: time for a revised security sector reform agenda', 5 *Conflict, Security & Development* (2005), pp. 295 at 308.

[29] Chesterman, *supra* n. 5, p. 7.

[30] C. Lopes and T. Theisohn, *Ownership, Leadership and Transformation: Can we do better for capacity development?* (London, Earthscan Publications 2003).

1.2 Who are the local owners?

Having established the centrality of the rule of law and presented the debate on the principle of local ownership, it is essential to take a closer look at who the local owners are. Too often, they are cited as an amorphous beneficiary without a clear understanding of the various factions that make up the local owners and the diverse interests that they may represent. Arguably, the number of potential owners that international actors have to interact with has grown with the increasingly intrusive and comprehensive nature of international intervention.[31] In addition to being the providers and the ultimate consumers of the rule of law, identifying distinct stakeholders and their respective interests will allow reformers to locate entry points for strategies of transition. Throughout the various degrees of ownership ranging from tolerance to active engagement and decision-making should be kept in mind, as different degrees of involvement will be required of different actors at different stages or with respect to different aspects of the reform process.

A nuanced view is also necessary, since the existing capacity and perceived 'immaturity' of various actors to assume responsibility are often used by donors as a reason to bypass local actors. This may well be a justified assessment in some cases, but is generally not based on a differentiated understanding of the various actors involved. Among local actors we can distinguish between (i) the population in its various organizational forms, i.e., the citizen, civil society and the business community; (ii) the authorities, i.e., the political leadership, the civil service and local government mechanisms; and (iii) members of the security sector, both individual staff members and security institutions.

First, interacting with the population will be most important with regard to developing an understanding of the rule of law. The individual citizen is a prime target for any effort to uphold and foster the rule of law, in that it is the citizen's perception of his security situation and of the validity of the body of law, as well as the citizen's willingness to use the formal judicial system that is the foundation for the system's viability. Rachel Neild explains that there is often a significant gap between the police and the community it serves, anchored in 'old' views of the police as the key guardian of security and as servants of central authority.[32] This points to what Otwin Marenin describes as the 'historical trajectories' that will determine much of the context for reform and heavily influence the parameters for establishing local ownership.[33]

The business community, as a specific interest group within the population, are relevant in that they require a clear legal framework within which to operate and will make investment decisions based on their assessment of legal certainty

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[31] B. Pouligny, 'Peacekeepers and Local Social Actors: The Need for Dynamic, Cross-Cultural Analysis', 5 *Global Governance* (1999), pp. 403 at 403.

[32] R. Neild, *Sustaining Reform: Democratic Policing in Central America* (Washington, D.C., Citizen Security Monitor/WOLA 2002) p. 16.

[33] O. Marenin, *Restoring Policing Systems in Conflict Torn Nations: Process, Problems, Prospects* (Occasional Paper No. 7, Geneva, DCAF 2005) pp. 33-35.

and predictability. At the same time, 'much of the state's economic activity [may be] implicated in the corrupt system and those with vested interests may struggle to hold on to past benefits as the state deteriorates.'[34]

Civil society, including NGOs (human rights and other advocacy groups), media, religious groups, labour unions and professional organizations, can play many different roles, most importantly in creating awareness, voicing public preferences and in holding the security system accountable. It is important to keep in mind that the wider population can come in a variety of shapes, sizes and levels of organization. The fact that international actors frequently arrive with a preconceived notion of what a special interest group might look like means the 'de facto exclusion of the so-called traditional forms of arrangements existing in the society.'[35] The international approach also relies on a flawed assumption that there is a distinction between the political sphere, i.e., the authorities, and the non-political sphere, i.e., the wider population, which is often non-existent. Beatrice Pouligny points out that that there is no such thing as a non-political civil society organization, in that

> 'most of the individuals at the head of [local] development NGOs that interact with member of UN missions also have close ties to political parties or even combine nongovernmental and political functions.'[36]

At the same time, earning the acceptance and active participation of the population and developing a rule of law culture is a key factor for the success of security sector reform efforts. It implies that the rule of law has been generally accepted as the guiding principle for the organization of relations between the state and society and for interaction within society. It is demonstrated through the specific oversight function that civil society organizations and formal bodies perform over public order and the justice system. A wider rule of law culture is critical for holding institutions accountable and this requires a minimum capacity in civil society. Local ownership is difficult after conflict when there is little 'social capital' and civil society struggles to organize itself effectively.[37]

Second, the political context is of course critical to the rule of law. At the level of the state or central government, political leaders, including the government and political parties, are the primary point of contact for an international intervention. In virtually every case, the international actors struggle to overcome the tendency to talk only to the top levels of government, a phenomenon known in development circles as 'elite capture'. These are the counterparts that donors are already most accustomed to interacting with. Except in extreme cases, such as humanitarian interventions or similar operations, the consent of host authorities that was characteristic of traditional peacekeeping operations is still the guiding principle for international efforts. This is both a question of principle and practicality. If

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[34] Rose-Ackerman, *supra* n. 15, p. 182.
[35] Pouligny, *supra* n. 31, p. 403.
[36] Ibid.
[37] Neild, *supra* n. 32, p. 16; see also Marenin, *supra* n. 33, p. 36.

genuinely pursuing local ownership, it is counterproductive to completely disregard the principle of sovereignty and it is necessary for the international actors to take into account the domestic body of law.

The political context is essential in that the notion of security sector reform and efforts to strengthen public security have a clear normative dimension represented in the call for good governance. This is based on the recognition that a reform of structures and institutions is meaningless unless these can be held democratically accountable; otherwise the state may simply become more effective at repression. In that way, acceptance of domestic rule of law institutions and practice is made conditional upon their compliance with the international normative order. Moreover, the traditional requirement of consent also becomes qualitatively different, when the government is weak or dysfunctional or does not control its territory. Krasner's notion of 'shared sovereignty' seeks to move beyond an either-or approach and proposes that a state voluntarily transfers its authority to an international guardian on specific issue areas, where it lacks the capacity to fulfill central functions itself.[38]

Jarat Chopra and Tanja Hohe suggest moving away from consent as something exclusively bestowed by government authorities, but to view it as a question of broad local support. They argue in favour of taking local government mechanisms, such as Council of Elders, warlords, chiefs or mayors, into account.[39] As a mechanism for governance, they have a critical role to play in developing and applying public security policies – and at times enforce civil, property or family laws – at a local level. However, the hallmark of a society governed by the rule of law is that the rules are independent of politics and that the same rules apply to all. While it is important to bring on board local mechanisms, they should not be allowed to weaken these basic principles.

The formal oversight mechanisms that oversee the public security institutions are a particularly important component of the political context. Fundamental principles for the establishment of these kinds of institutions can usefully be included in a *jus post bellum* as a critical element in the rule of law landscape and as a means to promote local ownership in the development and application of a country's laws. In combination with civil society organizations, the oversight bodies, such as parliamentary committees or ombudsmen, ensure that the security sector can be held accountable.[40]

The third group of actors consists of the members of the security sector itself. Members can be both organizations and individuals within those organiza-

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[38] Krasner, *supra* n. 26, p. 85.

[39] Chopra and Hohe, *supra* n. 7, pp. 290 et seq.

[40] The civil authorities mandated to control and oversee the agencies of the security sector are often included within delineations of what constitutes the security sector, but are here more usefully grouped among the political actors. See for example SSR definition by J. Chanaa, *Security Sector Reform: Issues, Challenges and Prospects* (Adelphi Paper No. 344, London, International Institute for Strategic Studies 2002). On the importance of legislatures in oversight, see also E. Rees, *Security Sector Reform (SSR) and Peace Operations: "Improvisation and Confusion" from the Field* (New York, United Nations Peacekeeping Best Practices, United Nations 2006) pp. 21 et seq.

tions. The institutions of the security sector are military and paramilitary forces; intelligence services; national and local police forces, including border guards and customs services; judicial and penal systems, including defense, prosecution and corrections services, as well as traditional justice mechanisms.[41] The individual members in those institutions are, for example police officers, judges, corrections staff, managers, administrators, etc. Here, Marenin distinguishes between the agencies of coercion, that is various security forces, and 'other agencies whose work is essential to sustain the effectiveness and accountability of the agencies of control'[42] including courts and oversight mechanisms. DFID also adds non-state security agents, such as private security companies, rebel armies or militias, all of which have separate organizational cultures and resulting practices. While the role of non-state security actors needs to be accepted, as there will often be a mixture of formal and informal mechanisms, the aim is to strengthen the state in order to ensure that the rule of law is applied consistently and that formal mechanisms can operate effectively.[43] Laws regulating rule of law agents, such as the police laws being put in place in West Africa and the Balkans, are pivotal elements of the institution building process and often part of a legal reform effort.

Naturally, these three groups of owners are not wholly independent of one another. In many post-conflict settings, the security sector and its agents are heavily politicized and the relationship between members of the security sector, the political leadership and the population are characterized by personal ties, clientelism and corruption. Frequently, these ties also extend to the criminal sphere and in the worst case result in what has been referred to as a 'criminalized state.'[44]

Within all and any of these groups of actors, there may be 'spoilers' that seek to derail the stabilization process.[45] Spoiler activity may be triggered by different issues or may take place at different stages of the process. In the same way, reform constituencies – that international interventions are frequently called upon to support – can be fluid and cut across the categories of actors identified above. The need to deal with spoilers has to be integrated into any strategy for transition. This generally has three main elements: First, dealing with spoilers involves overcoming resistance to reform and fostering support among all target audiences that make up the local counterparts. In particular, this means bringing forces of reform or potential supporters into the design, implementation and assessment of the reform process. As a champion of democracy, a *jus post bellum* can provide the guiding principles for a legal framework that allows for representative participation, secures freedom of speech for potentially hard-pressed pro-reform constituencies and ensures non-discrimination.

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[41] SSR definitions taken from Chanaa, *supra* n. 40. See also listing by DFID, *Security Sector Reform Policy Brief* (London, Department for International Development 2003) p. 3.

[42] Marenin, *supra* n. 33, pp. 13 et seq.

[43] DFID, *supra* n. 41, p. 3; Marenin *supra* n. 33, pp. 27 et seq., 51 et seq.; Rees, *supra* n. 40, p. 8.

[44] See for example J. Covey et al. (eds.), *The Quest for Viable Peace* (Washington, D.C., United States Institute for Peace 2005) and Marenin, *supra* n. 33, p. 26.

[45] See S.J. Stedman, 'Spoiler Problems in Peace Processes', 22 *International Security* (1997), pp. 5-54.

Second, spoiler management has to marginalize those groups that have not been co-opted into the reform process and that counter the rule of law and undermine the reform process. This may typically be political leaders unwilling to relinquish control over security forces, law enforcement and the judicial process or armed groups whose former public order role is likely to be threatened by the emergence of formal state security services and functioning judicial institutions.

Third, a critical component in dealing with potential spoilers – and in part preventing the emergence of additional spoilers – is managing expectations. Rachel Neild points out in reference to the reform process in El Salvador that the 'use of the term "community policing" arouses a set of expectations about community engagement, dialogue and a greater community role in orienting and even monitoring police work.'[46] Where expectations then remain unfulfilled, the local tolerance for reform which may not immediately bring tangible benefits, can quickly transform into opposition or calls for the 'old' order where an authoritarian state or local armed gangs maintained order, if not the rule of law. Managing expectations is not a one-off measure but requires a continuous effort to understand the rationale and dynamic among both local supporters and critics of the reform process.[47]

Given the complex constellation of local owners and the fact that the local owners are not a cohesive group and may represent a wide range of – often conflicting – interests, it is perhaps not surprising that a dilemma arises with regard to choosing local partners, which is explained in more detail below.

1.3 **Dilemmas of local ownership**

The debate on local ownership questions how valid and practicable the notion is. The above description of counterparts, then, reveals the complexity of local owners. Both sections have already pointed in the direction of the serious tensions involved in putting the principle of local ownership into practice. The author recognizes the centrality of local ownership for long-term consolidation and sustainability of the rule of law, but if there is to be any hope of imbuing the principle with real substance, it is equally important to acknowledge and face its inherent obstacles. There are a number of dilemmas that the international effort has to tackle: (i) the dilemma of process versus outcome; (ii) the dilemma of finding appropriate partners; (iii) the dilemma of opposing time frames and (iv) the dilemma of dependency. [48]

The first thorny question in local ownership is the dilemma of involving local actors in the process of implementing institutional reform versus allowing them to determine the objectives and outcome of the process, especially where the desired outcome may be contrary to international standards and human rights. The first dilemma – which a *jus post bellum* will almost certainly have to confront – often implies a tension between fostering local ownership and insisting on human

[46] Neild, *supra* n. 32, p. 15.
[47] Pouligny, *supra* n. 31, p. 403.
[48] This section is based on Hansen, *supra* n. 4.

rights based approach. This is particularly sensitive in cases where local law and traditions run up against western legal systems in issues such as the death penalty and humane punishment and gender equality before the law or against notions of democratic governance.[49] While lip service is often paid to the need for local involvement, in practice 'Ownership […] is usually not intended to mean control and often does not even imply a direct input into political questions.'[50] This dilemma becomes virtually insurmountable where there is no agreement on the overall outcome. Kosovo is perhaps the clearest example where the failure to resolve the issue of the province' status severely hampered progress in the state-building exercise. Even where transitional administrations disempower local actors, the goals of efforts to strengthen the rule of law need to be clearly defined at the outset. Chesterman suggests that the population has to accept 'that power is being exercised for ends that are both clear and achievable.'[51] Once agreement has been reached on a 'bottom-line', local decision-making is unlikely to derail the reform process as a whole.[52] If it is to be locally accepted, a *jus post bellum* will have to provide a 'bottom-line' but furnish this with sufficient flexibility to incorporate local preferences.

Second, as the plurality of actors above indicates, the international interveners consistently struggle with identifying appropriate local partners. In many cases, this may involve a choice between effectiveness, i.e., working with those that wield the most power, and legitimacy, i.e., working with those that have either the best international standing or the greatest public support. Those with the most capacity to cooperate with international agencies may not be the most appropriate partners.[53] This also points back to the issue of elite capture and is a reminder that the degree to which local elites are representative of the wider population and have the capacity to mobilize support may well be limited.[54] As Scheye points out,

> 'those wielding power may well have gained ascendancy because of the war; their continued enjoyment of the prerogatives of power may be dependent on the unsavoury and often illegal methods by which they acquired it, and the legitimacy of their exercise of political authority may be at best tentative.'[55]

Chopra and Hohe point to two possible courses of action, namely to 'either reinforce the *status quo* and build on it, further empowering the already strong; or replace altogether what exists with a new administrative order.'[56] In the latter case, one risks embarking on an endeavour that lacks local footing and is irrelevant to

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[49] Boon for one highlights the role of *jus post bellum* in promoting human rights and democratic process. Boon, *supra* n. 6, p. 10.

[50] Chesterman, *supra* n. 8, p. 4.

[51] Chesterman, *supra* n. 5, p. 3.

[52] Krasner, *supra* n. 26, pp. 104 et seq.

[53] International Alert, *supra* n. 21.

[54] Pouligny, *supra* n. 31, p. 403.

[55] E. Scheye, 'Transitions to local authority', in R. Dwan (ed.), *Executive Policing. Enforcing the Law in Peace Operations* (SIPRI Research Report No. 16, Stockholm, SIPRI 2002) pp. 102 at 104.

[56] Chopra and Hohe, *supra* n. 7, p. 289.

actual social and political developments. DiMeglio highlights the importance of local legitimacy in the context of *jus post bellum* and that 'citizens recognize and accept [the government] as legitimate'.[57] But more importantly, when the international actors deviate from the *status quo*, it is critical to recognize that the choice of whom they endorse as their legitimate counterpart is highly political and will have profound implications for the future political development of host state or territory.[58] Betting on a 'horse' other than the established authorities, has dubitable backing in international law, not to mention the fact that it is a comprehensive endeavour and will often be too ambitious for international funds and commitment over time.

Identifying appropriate local partners is especially problematic where different local parties disagree amongst themselves with regard to preferred outcomes.[59] A good example is the dispute over applicable law in Kosovo following the international intervention and the attendant withdrawal of Yugoslav security forces and members of the judiciary. Given that interventions usually take place in fragmented societies, different factions each only present one side of a complex story. Pouligny suggests that the inability to grasp the plurality of host societies can account for the failure to identify sources of support for the reform agenda and missed opportunities to consolidate change.[60] Ironically, one might argue that the more disagreement and potential for renewed conflict, the greater is the need for external guidance – and imposition. In his report to the Security Council the UN Secretary-General identifies a particular role for 'outsiders' in ensuring the inclusion of groups that are marginalized or traditionally excluded, such as minorities or women, and that may not have made it to the table had local dynamics been left to their own devices.[61]

In addition to the dilemma of identifying local partners, Eric Scheye and Gordon Peake pinpoint several other challenges. First, they point out that international attempts to carry out reforms in a post-conflict or post-authoritarian society are based on the flawed assumption that the staff members actually welcome change. In most cases, the reform will bring few benefits and instead entail disruptions of established work patterns and often threaten jobs.[62] Moreover, management of security sector reform is too often entrusted to the leaders that triggered the conflict or perpetuated an authoritarian regime in the first place. Clearly, the willingness to support a redistribution in the balance of power that effectively disempowers these leaders will be limited or non-existent. But even where there is a willingness to reform, Scheye and Peake argue that it is wrong to assume that local owners are masters of their environment.[63]

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[57] DiMeglio, *supra* n. 23, pp. 139, 138 et seq., 153.

[58] Chesterman, *supra* n. 5, p. 19.

[59] Krasner, *supra* n. 26, p. 100; Chesterman, *supra* n. 5, p. 19.

[60] Pouligny, *supra* n. 31, p. 403.

[61] UN Doc., *supra* n. 2, p. 6.

[62] E. Scheye and G. Peake, 'Unknotting Local Ownership', in A. Ebnöther and P. Fluri (eds.), *After Intervention: Public Security in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (Geneva, DCAF 2005) pp. 235-260.

[63] Scheye and Peake, *supra* n. 62.

The third dilemma concerns the connection between the timeframes of donors and those required for institution and capacity building. Building sustainable and locally driven rule of law institutions is a long-term endeavour and often at odds with more short-sighted donor cycles. The scope of the undertaking of building capable institutions goes far beyond the limited timeframes of most interventions.[64] Too often the time it takes to develop popular views on the rule of law is also underestimated and local options are by-passed because they take more time.[65] At times, the divergent timeframes introduce disharmony between 'developers' and 'peacekeepers', in that the latter traditionally have much shorter timeframes for their mandates. The dilemma of timeframes also links back to the issue of identifying local partners. As Krasner points out, where there is disagreement

> 'about the distribution of power and the constitutional structure of the new state, […] the optimal strategy for their political leaders is to strengthen their own position in anticipation of the departure of external actors. [At the same time,] local leaders who become dependent on external actors during a transitional administration, but who lack support within their own country, do not have an incentive to invest in the development of new institutional arrangements that would allow their external benefactors to leave at an earlier date.'[66]

The dilemma of opposing timeframes is linked to the fourth dilemma, which has to do with the difficult balance between assistance, dependency and affordability. While international funds are needed to enable a reform process, there is a danger of creating a dependency on international assistance and creating structures that are not affordable for the society in question. Also, international crisis management operations and their functional programmes, especially in the UN context, are reliant on funding produced by donor conferences and other *ad hoc* financing mechanisms. This type of financing is inherently unsuitable for long-term institution building processes that require future funding to be reasonably predictable in order to be credible and to succeed.[67] At the same time, heavy external involvement might relieve local parties of taking responsibility and ownership for proposed solutions. Dependency becomes a matter of decision-making, when external actors tackle unpopular and difficult political issues on behalf of their local partners.[68]

2. Obstacles to Local Ownership

2.1 **Local ownership in corrupt and criminalized environments**

Efforts to build the rule of law often fall victim to a corrupt and criminalized environment. Ties to criminal networks and political interference in policing or in trials,

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[64] Chopra and Hohe, *supra* n. 7, p. 289; Scheye, *supra* n. 55, pp. 106 et seq.
[65] Scheye and Peake, *supra* n. 62; Caplan, *supra* n. 9, p. 51.
[66] Krasner, *supra* n. 26, pp. 100 et seq.
[67] Fearon and Laitin, *supra* n. 12, p. 26; Krasner, *supra* n. 26, p. 100.
[68] Caplan, *supra* n. 9, p. 11.

undermines the course of justice, but also the fragile popular confidence in the ability of the state to deliver justice. But although widespread corruption and criminalized states are so debilitating to peace-building efforts, virtually all cases have shown that little consolidated effort has been made to address the twin problems of corruption and organized crime.[69] Moreover, responsibility for the rule of law is transferred to local authorities despite the fact that they are known to be corrupt.

Although it is ultimately desirable that local owners take charge of their justice and security sector and are responsible for the rule of law, international efforts to transfer responsibility should be tempered by a realistic assessment of local capabilities and willingness to fulfill this role effectively and impartially. The most obvious partners, i.e., those with all the power, may be the most corrupt and the most interested in retaining their power rather than engaging in a reform process. The same is true of authorities that interfere in the application of the rule of law. Choosing partners therefore depends on an assessment of the willingness and the capacity for reform. While capacity can be developed, working with a counterpart who is unwilling to address corruption renders reform efforts largely ineffective. One can imagine a typology with four possible scenarios: (i) The local actors are neither willing nor able to (re-)establish the rule of law and it may be necessary to create a new administration, a *reinvention*,[70] (ii) they may be willing but not able, which would require *integration*, i.e., – where they do exist – structures can be incorporated into the state-building process; (iii) the local counterparts may be able but not willing to carry out reforms, a scenario which calls for a transformation process; (iv) or they may be both willing and able, at which point authority should be in local hands and international support would focus on reinforcing existing authorities.

In many cases, political authorities are not particularly interested in relinquishing or regulating their own power, in fact gain from a certain amount of instability and a non-functional rule of law and still pursue an agenda that seeks to discriminate against their opponents. In these circumstances, sustained local commitment to conduct rule of law reform is tenuous at best. Authority will still have to be transferred eventually, but putting in place the minimum requirements for local ownership in areas related to corruption, crime and political interference may take longer, may involve delving deeply into the fabric of society and may require international oversight for an extended period of time even after formal authority has been handed over. Meeting these challenges involves bringing about fundamental changes in a post-conflict society and requires a coordinated international approach.

Political interference occurs in police investigations, prosecution and conviction of suspected criminals, in selection, recruitment and appointment processes and in budgetary matters. It is often widespread, systematic and usually based on

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[69] A.S. Hansen, *From Congo to Kosovo: Civilian Police in Peace Operations* (Adelphi Paper No. 343, London, International Institute for Strategic Studies 2002) pp. 91-93.

[70] Chopra and Hohe, *supra* n. 7. The willing/able typology is borrowed from R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, Polity Press 2002).

ethnic loyalties.[71] It thrives where control mechanisms are non-existent and institutional divisions of responsibility are unclear.[72] Often political authorities as well as the justice and security sector itself may consider government manipulation to be 'normal' due their prior experiences under an authoritarian regime. *Jus post bellum* can contribute by demarcating areas of authority or clarifying basic principles of democratic governance, including the division of powers, transparency and accountability. A legal framework that includes clear provisions on the appropriate relationship between politics and the implementation of justice is an essential guard against undue political interference by nationalistic or factionalized political authority. The UN Convention against Corruption also calls for corruption to be criminalized.[73] Instilling a greater sense of professionalism and professional pride in rule of law institutions is a key element in a strategy to combat political interference.[74] Transparency also has to be a guiding principle, as de-politicization efforts clearly play to a domestic audience and a public that has – if any – a mere fragile confidence in its police service and judicial system.

Typically, an anti-corruption effort will aim to break cycles of impunity and codes of silence through protection for whistle-blowers and witness protection programmes. But these are also extremely difficult to implement in closed, clan-based societies, such as Albania or Kosovo. Here, the challenge is only in part one of creating the necessary legal instruments. At the international level, there are binding documents, such as the UN Convention against Corruption and the UN Code of Conduct for Law Enforcement Officials and most domestic bodies of law prohibit corruption and organized crime. Instead, a change in mindset is required to convince police services and the judicial system to enforce the existing laws. Where corruption is an engrained part of the society's way of life, breaking into cycles of crime and corruption is a problem of daunting scope and nature and efforts to put in place a locally owned democratic rule of law are rendered at best challenging and at worst absurd. In many cases ranging from the Balkans to Africa and Latin America, the fight against corruption is institutionalized in different parts of state administration, including police services and courts. The population in many countries both

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[71] Hansen, *supra* n. 69, p. 101.

[72] M. Punch, 'Rotten Orchards: "Pestilence", Police Misconduct and System Failure', 13 *Policing & Society* (2003) pp. 171 at 174; D. Bruce and R. Neild, *The police that we want. A handbook for oversight of police in South Africa* (Johannesburg, Centre for the Study of Violence and Reconciliation 2005) p. 37.

[73] *UN Convention against Corruption* Chapter III.

[74] Several authors underline that corruption is often tolerated due to the reigning organisational culture. Punch, *supra* n. 72, p. 194; L. Westmarland, 'Police Ethics and Integrity: Breaking the Blue Code of Silence', 15 *Policing & Society* (2005), pp. 145 at 155 et seq.; M. Marks, 'Shifting Gears or Slamming the Brakes? A Review of Police Behavioural Change in a Post-apartheid Police Unit', 13 *Policing & Society* (2003), pp. 235-258; C.B. Klockars et al., *The Measurement of Police Integrity* (Washington, D.C., National Institute of Justice 2000); Independent Commission on Policing for Northern Ireland ('The Patten Commission'). *A New Beginning: Policing in Northern Ireland* (September 1999), <http://www.belfast.org.uk> (accessed May 2005) para. 5.20.

tolerates and perpetuates black market activity for a variety of reasons ranging from mere survival to a more sinister desire for economic gains.[75]

Oversight structures are part of a long-term strategy to overcome limitations to local ownership. Oversight is in part conducted by internationals monitors, mentors and advisers, but oversight is also part of an institution and capacity building process, in that locally-run oversight mechanisms are essential to implementing local ownership and enhancing popular trust in rule of law institutions.[76] Examples of oversight bodies are independent bodies for senior appointments, complaints monitoring mechanisms, codes of conduct and disciplinary action in police and justice institutions. Developing the capacity for civilian oversight over the justice and security sector also includes providing support to civil society organizations to better enable them to fulfill their oversight role.

Aside from changes in the organizational culture, it is important to develop the local capacity to combat high-profile crimes in police services and judiciaries, including technical skills, investigative techniques, building and prosecuting complex cases, etc. The ability and willingness to combat high-profile crime will also depend on the supportive framework and conditions of service, including witness protection programmes, benefits for the dependents of rule of law staff killed or injured in the line of duty.[77] Fighting organized crime and corruption requires in-depth knowledge of criminal networks and the society more generally, as well as a network of contacts that can assist in the fight.[78] At the same time, the local police service and justice system may be too involved or too frightened to conduct the fight effectively. This underlines the need to find ways in which international assistance can cooperate with local partners – drawing on their knowledge and developing capacity. The first steps toward breaking into criminal networks can benefit and indeed may depend on independent external investigators and advisers. Contrasting timelines and donor demands also make efforts to fight organized crime and corruption difficult, as the efforts are likely to have a long lead-in time and donors are unlikely to see a return on their money in the short-term.

In many ways, fighting corruption and political interference is part of managing spoilers and is affected by the degree to which local actors can be brought onboard. On the one hand, the fight benefits in terms of effectiveness and legitimacy the more it can incorporate local partners. On the other hand, legitimacy and effectiveness are reduced if efforts to combat organized crime and corruption take place in cooperation with individuals that the population suspects of being complicit, i.e., corrupt or part of criminal networks. Vigorous efforts may also alienate local partners at the political level, whose support may be necessary for the successful

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[75] A. Goldsmith, 'Policing Weak States: Citizen Safety and State Responsibility', 13 *Policing & Society* (2003), pp. 3 at 12, 18.

[76] Bruce and Neild, *supra* n. 72, p. 39; Rees, *supra* n. 40, pp. 18, 21 et seq., 25.

[77] Bruce and Neild, *supra* n. 72, pp. 16, 41; *UN Convention*, *supra* n. 73, Chapter II, Art. 7(1); *UN Basic Principles on Use of Force and Firearms by Law Enforcement Officials*, § 1.

[78] A.S. Hansen, *Supporting the Rule of Law in War-torn Societies – Comparative Advantages of Civilian Police and Military Forces* (Kjeller, Norwegian Defence Research Establishment 2005) pp. 35 et seq.

promotion of reforms in other areas. International reformers have to decide in each case, how much pragmatism is acceptable, without endangering the viability and legitimacy of the rule of law reform project as a whole.

2.2 Potential and limitations of traditional justice

The question of how to implement the principle of local ownership also arises in the debate on whether and how to endorse traditional mechanisms of justice and how they may be incorporated into a *jus post bellum*. The argument in favour of taking traditional mechanisms into account is an obvious application of the principle of local ownership and the notion that reform processes must be adjusted to the particularities of each case. In that way, making use of existing traditional justice mechanisms is a tool to promote ownership, as well as the 'embodiment' of ownership. In the past little attention has been paid to traditional approaches which were instinctively branded as backward, undemocratic or simply incomprehensible by external interveners. In keeping with the spirit of local ownership, international agencies should at least meet traditional rule of law mechanisms with respect and an open mind. While international human rights standards should not be compromised, they cannot become an excuse not to engage and look for genuine opportunities to integrate traditional approaches.

There is a practical aspect to the argument in favour of using traditional justice mechanisms, in that they have been promoted as a direct response to shortfalls in the formal system's ability to deliver justice, due to overwhelmingly large case loads, limited capacity, limited reach or corruption. They also represent an attempt to find a form of justice that is relevant, meaningful and accessible to the masses. Other potential benefits of employing traditional justice mechanisms are a) an existing framework that is already established throughout the country;[79] b) a form of 'restorative justice' that can assist in reconciling community relations; c) a familiar, legitimate mechanism for the victim and the perpetrator; and d) a relatively inexpensive option compared to formal justice mechanisms.[80]

But there is a danger of falling prey to a romanticized notion of traditional justice. In many cases, the international community should temper its enthusiasm for traditional justice mechanisms as the ideal approach. Many such systems are tribal or clan centred, closely aligned to local power structures and often discriminate along ethnic and gender lines. In supporting traditional justice mechanisms, the international community may be reinforcing structures that do not conform to international human rights standards and re-create an idealized version of a biased

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[79] The picture becomes more complex where different traditional mechanisms are at work in different parts of the country. Also, there are regional differences with regard to the relevance of informal mechanisms. They are generally not as important in urban areas, where state structures are more prominent and more effective. R.M. Perito and L. Miller, *Establishing the Rule of Law in Afghanistan* (USIP Special Report 117, Washington, D.C., USIP 2004) pp. 8, 10.

[80] J. Alexander, *A Scoping Study of Transitional Justice and Poverty Reduction. Final Report for the Department for the International Development* (London, DFID 2003) p. 28.

system. A good example is the case of Timor-Leste, where the local Timorese law approaches to sexual crimes – financial compensation to the victim's family or promise to marry the victim – were especially problematic.[81] Traditional judicial processes, such as in the *gacaca* courts system in Timor-Leste, may not be able to offer minimal standards of due process the legal counsel; judges received minimal training and were not seen to be objective arbitrators.[82]

Although local traditional justice mechanisms have been used in recent transitional justice strategies, a healthy dose of scepticism remains necessary when it comes to applying traditional justice to war crimes and genocide. Here, it is especially important that trials live up to international standards. DiMeglio includes the need to hold culprits accountable and to deter future abuses among his fundamental principles for a just *post bellum*, arguing that transitional justice is the natural continuation of just war theory.[83] Outsiders tempted to endorse traditional solutions should be aware that the distribution of power has often shifted during conflict, where ostensibly traditional mechanisms may – in the wake of a conflict – in fact be ruled by the gun rather than by traditional sources of authority.[84] Afghanistan is a good example where traditional mechanisms of justice have been hijacked by warlords and are manipulated by local power holders.

Other experiences show how traditional mechanisms may be the pragmatic alternative where the absence of a formal country-wide system has left a void. As consolidating the rule of law is a gradual process, this can mean that shortfalls in human rights have to be tolerated in a transitional phase in order to build greater respect for human rights over time, especially where traditional mechanisms are the only trusted and accessible form of justice. Traditional justice mechanisms can also be an efficient and cost-effective way of reaching out to communities and dispensing justice. In the absence of credible alternatives, Sierra Leoneans, for instance, trust in informal leadership structures despite flaws and abuse. Given that the formal justice systems do not reach beyond cities in Sierra Leone and Liberia, it is the informal systems that allow the majority of the population to have any access to justice at all. However, where traditional forms become an excuse to neglect the long-term institution building process, this can backfire as in the case of Afghanistan, where the failure of a state-wide formal justice system to gain a foothold in many regions has inadvertently consolidated informal mechanisms.[85] Ultimately, a way must be found to intersect the traditional justice mechanisms and the formal justice sector in the countries, establish a relationship between central and regional authority and address the question of how to enhance community mechanisms.

A key step in ensuring long-term viability is to work towards harmonizing traditional mechanisms, a formal justice system and international norms. One dis-

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[81] T. Hohe and R. Nixon, *Reconciling justice: 'Traditional' law and state judiciary in East Timor* (Paper, Washington, D.C., USIP 2003).

[82] Alexander, *supra* n. 80, p. 30.

[83] DiMeglio, *supra* n. 23, pp. 153 et seq.

[84] Marenin, *supra* n. 33, p. 36.

[85] Perito and Miller, *supra* n. 79, pp. 3, 10.

crete measure which international actors can implement to increase the 'standing' of traditional justice mechanisms in the international human rights context is to provide training in issues such as non-discrimination, non-use of inhuman or degrading punishments, to help improve the laws and practices of the local systems so that they may be consistent with international standards.[86]

3. Concluding Remarks

The predominant challenge for the principle of local ownership and for the practicability and relevance of a *jus post bellum* has to do with the distance between international norms and local preferences. International actors should be careful about assuming that local owners share the same agenda. Divergence in views on priorities, processes and outcomes can be the product of sinister ambitions on the part of a few or that of cultural and societal traditions of the many. After years of fighting and/or suppression, a simple 'switch' to principles of democracy, the rule of law and human rights may be difficult to bring about. Although this is likely to be a comprehensive and time-consuming process, this does not mean that a transition should not be attempted. At the same time, it is critical that international reformers are prepared to confront two almost inevitable tensions that will also make themselves felt in the underlying principles and the design of a *jus post bellum*.

The first tension has to do with the dual objectives of establishing the rule of law, on the one hand, and increasing the participation and control of local owners, on the other. A situation is easily conceivable where these two aims conflict. For instance, local owners may be confidently, capably and effectively taking charge, but the rule of law may suffer because it is applied unevenly or unjustly. The international presence will then have to decide which of its two goals to prioritize: whether it wants to promote local ownership perhaps at the expense of human rights or step in to override local ownership and safeguard the democratic rule of law.[87]

The second tension concerns the mismatch between aims and means. While the international reform agenda puts a high premium on promoting the democratic rule of law, the means it employs are far from democratic and international accountability is non-existent. Or, as Chesterman puts it, 'how does one help a population prepare for democratic governance and the rule of law by imposing a form of benevolent autocracy?'[88] Regardless of the challenges, dilemmas and obstacles involved in implementing the principle of local ownership, there is ultimately no alternative to transferring the responsibility for maintaining a just order to the local actors who will use, govern and be subject to the rule of law.

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[86] DFID, *Non-state justice and security systems* (London, DFID 2004).

[87] A.S. Hansen and S. Wiharta, *The transition to a just order. Establishing local ownership after conflict. A Policy Report* (Stockholm, Folke Bernadotte Academy (FBA) 2007). DiMeglio accepts the necessity of political restructuring after conflict and suggests that it would fall to the *jus post bellum* to outline the scope and content of necessary political change and the international role in the reform process. *Supra* n. 23, pp. 148-151.

[88] Chesterman, *supra* n. 5, p. 11. See also Boon on the limits of international authority, *supra* n. 6, pp. 7 et seq.

Chapter 8
FROM RELEVANCE OF JUS POST BELLUM: A PRACTITIONER'S PERSPECTIVE

Charles Garraway*

Abstract
This essay revisits the challenges of jus post bellum from the perspective of legal practice. It identifies four areas of law in which normative uncertainty creates problems on the ground: (i) occupation, (ii) the use of force, (iii) detention and (iv) criminal justice. It argues that a coherent structure covering violence at all levels is needed to assist those tasked with restoring normality to abnormal situations.

Introduction

My task is to provide a 'practitioner's perspective' of the relevance of *jus post bellum*. It is important therefore that I identify the type of practitioner that I am! My opinions are moulded by thirty years experience as a military lawyer in the British Army, including operational tours of duty and also as a member of the Coalition Provisional Authority in Baghdad for three months in late 2003. It follows that what I will be trying to present is not a detailed assessment of the law from a theoretical viewpoint but more of a 'worm's eye' view from someone who has tried to implement the law on the ground and has had to wrestle with its inherent ambiguities.

International law, in relation to armed conflict, has traditionally been divided into two separate areas, the *jus ad bellum*, dealing with the justification for the use of force, and the *jus in bello*, dealing in turn with the conduct of hostilities and the treatment of victims of conflict. This grew out of the old concept of a clear division between war and peace. Outside war, the law of peace applied which meant primarily domestic law. Post-conflict law was not dealt with in any detail – except in relation to occupation – as it was considered as a matter falling within the responsibility of domestic law. Occupation was only covered because of the residual aspects where one belligerent state had retained control over the territory of another, thus introducing an international element.

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However, as has been found increasingly in recent years, winning wars is easy – it is winning the peace that is difficult. This is not least because domestic law is often the first casualty of conflict and therefore may not be in a position to assume its expected role. Also the spectrum of violence is now such that the clear divide between war and peace no longer exists – if it ever did. Instead we live in a world where there are different spectra of violence, all with different legal regimes applying. The problem that the soldier and his commanders, face is making sense of the artificial divides provided by the law when operating in scenarios that simply do not lend themselves to clear dividing lines.

In examining the problems on the ground, I want to look at four different areas, occupation itself, the use of force, detention and criminal justice.

1. Occupation

Occupation law is based fundamentally on the 1907 Hague Regulations[1] and the Fourth Geneva Convention of 1949.[2] The Hague Regulations reflected the reality of life at that time. The final status of occupied territory was a matter to be resolved by the parties themselves in any final peace treaty. In the meantime, the task of international law was to preserve the *status quo* to the maximum extent possible until a final settlement was reached. It followed that the rules and regulations governing occupation were designed to prevent the occupier introducing changes that might consolidate any claim to the territory whilst, at the same time, allowing him to take such steps as were necessary to maintain law and order in the territory and to ensure the protection of his own troops.

This conservationist principle extended into the Fourth Geneva Convention despite the experience of the Allies at the end of WW II. There, in a situation of '*debellatio*', it was clear that the conservationist principle simply did not work. In 1907 – and indeed before that – *debellatio* would have amounted to conquest and the consequent annexing of the conquered territory into that of the victorious state. However, that was not the intention of the Allies who, for the most part, had no territorial ambitions in respect of Germany or Japan. The intention was to restore those states to full sovereignty in order to enable them to resume their places in the community of nations. To put it another way, the aim was 'transformative'. Such occupations did not fit easily within the conservationist structure of the Hague Regulations and this challenge led advisers and scholars to acknowledge that the actions of the Allies in seeking to restore and transform the governments of Germany and Japan were acting outside the narrow confines of the Regulations.[3]

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[1] 1907 Regulations Respecting the Laws and Customs of War on Land Annexed to 1907 Convention IV Respecting the Laws and Customs of War on Land, reprinted in A. Roberts and R. Guelff (eds.), *Documents on the Law of War*, 3rd edn. (Oxford, Oxford University Press 2003), p. 73.

[2] 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, reprinted in Roberts and Guelff, *supra* n. 1, p.299.

[3] See The Law of War on Land being Part III of the Manual of Military Law ('MML Part III'), HMSO 1958, para. 499, note 2, p.140.

If the conservationist approach was recognized as difficult to implement in all circumstances as early as 1945, how much more difficult is it in the new situations that we face in the 21st century? War is now supposed to be illegal under the United Nations Charter and the use of force limited to self defense and operations conducted under a United Nations mandate. Occupations arising out of such circumstances tend to be long-term and/or transformative in that the aim of the intervention is to remove a governing elite as was the case with Japan and Germany. In both cases, the traditional law of occupation can be seen as ineffective and, in some cases, to act against the interests of the peoples of the occupied territory whom it is supposed to protect. Yet it is understandable that there is a reluctance to move away from the conservationist ideas expressed in the Hague Regulations. To do anything else might be seen as encouraging or legitimizing aggression.

The arguments over the 2003 intervention in Iraq illustrate the point. In the light of the heated debate as to the legality of the intervention in that it was conducted without a United Nations authorization, there was considerable reluctance to allow the Coalition Provisional Authority, as the representative of the Occupying Powers, a free hand in the reconstruction of Iraq. And yet, there was a need to take into account the reality of the situation. There was no way that power was going to be handed back to Saddam Hussein or the Baath Party nor, in view of their proven track record, was that a sensible course of action. But if the *status quo ante* was not to be the solution, then what could be done within the existing legal framework? How could the economic and political reconstruction of Iraq that was so desperately needed be brought within a very conservationist legal regime?

The answer is to be found in United Nations Security Council Resolution 1483.[4] Here, the Security Council, without seeking to rule on the legality of the intervention, sought to create a framework where the Special Representative of the Secretary-General, acting in collaboration with the Coalition Provisional Authority, was given specific tasking in his role 'assisting the people of Iraq' to undertake changes to the Iraqi infrastructure which went far beyond what might be permitted under a conservationist approach.

This reflected the role of the Security Council in other 'quasi-occupation' situations, such as Kosovo and East Timor, where territories had been placed effectively under a United Nations mandate. But this raises difficult questions of the interrelationship between United Nations law and international humanitarian law. To what extent can the United Nations Security Council, a political body, supplement and on occasions override the provisions of international humanitarian law? Its authority, stemming from Article 103 of the Charter,[5] seems to be incontrovertible but some insist that it has no authority to override provisions that are recognized as customary international law or, still more, *jus cogens*.

On the other hand, this seems a pragmatic solution to a difficult question. The conservationist principle underpinning the law of occupation survives but can

[4] UNSC Res. 1483 (2003) of 22 May 2003.

[5] Art. 103, Charter of the United Nations, reprinted in Ian Brownlie (ed.), *Basic Documents in International Law*, 5th edn. (Oxford, Oxford University Press 2002), p. 24.

be amended where necessary by the power of the United Nations Security Council acting under Chapter VII of the Charter. It is indeed unfortunate that the experiment in the assimilation of these two legal regimes was nullified to a considerable extent by the bombing of the United Nations Headquarters in Baghdad in August 2003 and the tragic death of Sergio Vierra de Mello, the Special Representative. This left the Coalition Provisional Authority as the main player and it was thus able to interpret the mandate given by the Security Council in the most advantageous manner. Whether the decisions taken by the Coalition Provisional Authority in that respect were right, ill-advised or simply illegal is a matter that historians will decide but the concept of a legal framework involving the complementary application of the conservationist approach of occupation law and the transformative powers of United Nations law is an interesting one and worth examining further.

2. Use of Force

There is a clear distinction between the authority for the use of force within armed conflict and that outside it. In international armed conflict, the decision on whom and what can be attacked is primarily status based. Is the target a combatant or a military objective? If it is, it can be attacked without warning (in most cases) and, in the case of combatants, with no obligation to attempt capture first. This often surprises many but a combatant under international humanitarian law is entitled to take a direct part in hostilities which includes the right to kill enemy combatants. The *quid pro quo* is that he or she can himself or herself be killed in the same manner at any time. Combatants are legitimate targets at all times whether awake or asleep, on duty or off.

In peacetime, the use of force is much more restricted. It is based on self-defense and dependent on threat. No more force can be used than is absolutely necessary to counter the threat faced. This is entirely in accordance with human rights law. However, the divide between war and peace is no longer as clear as many would like and therefore the authority governing the amount of force that can be used has also lost clarity. Rules of Engagement seek to bridge that gap by seeking to give to soldiers clear instructions as to their right to, for example, open fire. But Rules of Engagement are not the law as they reflect political and military factors as well. For example, during an international armed conflict, the military may be manning a checkpoint some way behind the front line. Rules of Engagement may restrict the soldiers so that they can only open fire in self-defense (i.e., on a threat basis). However, international law may give them wider powers. If enemy combatants approach, under international law, unless surrendering, they can be directly targeted. This would include situations where they were not a direct threat to the soldiers on the checkpoint. If they engaged in such circumstances, the soldiers would not be guilty of murder though they might be guilty of disobedience to orders.

But of course, not all cases are as clear as that either. What if the combatants are not soldiers but civilians taking a direct part in hostilities? Such civilians

lose their protection and can also be targeted.[6] Again, the targeting is as a result of their status, not the threat that they pose. A civilian who attacks military personnel with rocks or even sticks during an international armed conflict is liable to be shot dead. There is no obligation on the troops to try to disarm him or her or to capture. However, it needs to be made plain that what is permitted is not necessarily what is sensible! Thus, there may be considerable advantages in such circumstances in adopting a more 'human rights based' approach. Disarmament and capture may provide useful intelligence and is less likely to inflame local passions. What is legal and what is sensible are two different subjects.

But not only are the actors on the battlefield changing, so is the battlefield itself. Soldiers are now frequently involved in post-conflict situations where the international rules are far from clear. What is the entitlement to use force during a period of occupation? Do 'combat rules' apply or have we moved to a more threat based regime? And what is the position where 'major combat operations' may have ceased but violence persists? In Helmand province, some five years after the initial intervention, United Kingdom and other NATO forces have been involved in what one senior officer described as the most intense fighting since the Korean War.[7] But what law applies to the actions of those soldiers? On what basis are targeting decisions taken? The stark difference between status based and threat based legal regimes causes inevitable difficulties when operating in the grey area that is post-conflict.

Under the European Convention on Human Rights, Article 2 – the right to life – is non-derogable except for lawful acts of war[8] but is derogation even an option? Can it truly be said that the situation in Afghanistan is a war or other public emergency that threatens the life of the United Kingdom? Indeed, does the Convention – or the International Covenant on Civil and Political Rights[9] – even apply in situations of this nature where troops are operating outside their national boundaries? These are issues over which there is strong disagreement, particularly within the United States,[10] and yet for members of the armed forces, they are critical. They may represent the difference between a gallantry medal and a prosecution for murder.

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[6] See Art. 51(3), 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I), reprinted in Roberts and Guelff, *supra* n. 1, p. 448.

[7] See Richard Norton-Taylor, British troops in Afghanistan 'in most intense conflict in 50 years', *Guardian Unlimited*, 11 August 2006, accessed at <http://www.guardian.co.uk/afghanistan/story/0,,1842151,00.html>,

[8] Art.15(2), European Convention for the Protection of Human Rights, reprinted in Brownlie, *supra* n. 5, p. 249.

[9] International Covenant on Civil and Political Rights, 16 December 1966, reprinted in Brownlie, *supra* n. 5, p. 205.

[10] See M.J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005), p. 119.

3. Detention

During armed conflict itself, the rules on detention are comparatively clear. The third and fourth Geneva Conventions of 1949[11] lay down detailed rules governing the treatment of prisoners of war and civilian internees. However, these Conventions cease to have effect outside armed conflict and occupation. All prisoners of war are to be released at the end of active hostilities and internees at the end of any occupation or when they cease to be a threat, whichever is earlier. However, real life is again not so simple. As we have already seen, war and peace do not have such clear boundaries and people do not cease to be a risk just because 'active hostilities' have ceased. The end of hostilities is unlikely to be accompanied by an immediate transition to a regime where a fully operating criminal justice system can take up the strain. There may be a need for some form of administrative internment. This need is recognized in situations of occupation but not all post conflict situations amount to occupation.

In most post-conflict societies, the rule of law is something that needs immediate attention. However, reconstructing it is not a matter that can be achieved overnight. A country ravaged by war, particularly civil war, may not have a working justice system. In Kosovo, the justice system had been administered by Serbs and the incoming NATO forces found an almost complete absence of judges, police and lawyers. Indeed, there was even disagreement on the law itself as Kosovo Albanians were unwilling to accept Serb-imposed laws and wanted to return to their own autonomous laws. A similar situation could be found in East Timor. In Afghanistan, not only is there a dearth of trained personnel but much of the infrastructure too has been left in ruins.

In such situations, international help may be required. There may be foreign troops and personnel present in the territory under a United Nations mandate. How should those troops and their civilian element react to a situation where the application of even basic human rights standards is simply not possible? In Afghanistan, there is not a single detention facility that could comply with basic human rights requirements and yet the need for detention is overwhelming. Afghanistan has no money to pay for new facilities and indeed it may consider that it has more pressing needs than spending vast sums on housing detainees in greater comfort than most of the civilian population. This poses a problem for coalition forces. How do they deal with this conundrum? If they hand over detainees to unsatisfactory Afghan facilities, they are open to criticism and indeed may, subject to applicability, be in breach of their own human rights obligations. On the other hand, if they seek to hold the detainees themselves, there are further issues as to authority and different human rights obligations may arise. They are caught between a rock and a hard place.

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[11] 1949 Geneva Conventions Relative to the Treatment of Prisoners of War (Geneva Convention III) and Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), reprinted in Roberts and Guelff, *supra* n. 1, pp. 243 and 299 respectively.

What standards should apply? Clearly it is likely to cause discontent if detainees are better off than those at liberty but can there be a sliding scale of rights for detainees? Even if one agrees that standards of detention acceptable in Afghanistan may be less than those which would be acceptable in Western Europe, how does one apply that to coalition forces and their own human rights obligations? Is it acceptable for them to hand over detainees for treatment that would not be considered acceptable by the European Court of Human Rights? Again issues over derogation arise.

The starkness of this issue is well illustrated by Afghanistan but it applies in most post-conflict societies and is certainly one that will confront any international assistance whether brought in under national or international auspices.

4. Criminal Justice

Linked to but separate from the detention issue is that of criminal justice as a whole. The rule of law is one of the most important areas in any post-conflict scenario but the most difficult to achieve. As has been seen when considering detention issues, the legal framework of the country or area concerned is likely to be fragile, if it exists at all.

In a post-conflict situation, criminal justice will normally divide into two parts. There is transitional justice, which looks back and seeks redress for past wrongs, and what I will call contemporary justice, looking forward and building for the future. Each presents its own set of difficulties.

In the case of transitional justice, there is the constant pressure between the interests of peace and the interests of justice. Those who know that they face retribution will often consider that they have nothing to lose and fight to the end. The tyrant will cling to power – and the immunity that may come with it – for as long as possible to avoid the inevitable aftermath. The pressure on peace negotiators to agree amnesties of some sort is immense and will not disappear. This is indeed being seen at the present time in relation to Uganda who referred the situation there involving the Lord's Resistance Army to the International Criminal Court at a time when the struggle was still ongoing. Now, when it appears that there is the possibility of peace, Uganda is looking for a way to withdraw that referral. Joseph Kony and his lieutenants are not going to hand themselves over to the Ugandan authorities if they know that they will be immediately transported to The Hague and placed on trial for war crimes.

Despite this conundrum, there are situations where transitional justice is both relevant and apposite. However, there are still problems to be overcome. The need is to ensure that the concentration is on justice and not vengeance. Local solutions may tend towards the latter whilst international justice may be too remote. The answer may be a mix of the two where the leading players face international justice whilst lesser players are dealt with locally. This has been the inevitable result of the International Tribunals in the Former Yugoslavia and Rwanda. The Tribunals themselves can only deal with the very tip of the iceberg in terms of numbers

and thus the vast majority of cases will have to be dealt with locally through the courts or some truth revealing structure. But local courts and lawyers are unlikely to be capable of handling such cases, particularly in a post conflict situation, without substantial international help.

Every situation will require a different solution and there is no 'one size fits all' answer. The answer must be situation specific and sensitive to the local population. However, this is a matter that must be attended to early on. In Iraq, the cries for vengeance against the Baath Party and their acolytes were deafening. The fear was that, if something was not done – and seen to be done – there was a risk of people taking the law into their own hands. The people of Iraq were adamant that, as most of the crimes committed had been against the people themselves, it was for Iraqis themselves to deal with the matter. The occupying authorities were thus faced with a dilemma. Any attempt to establish an international tribunal to try Saddam Hussein would have met with outrage in Iraq and yet there was a serious danger of any domestic court becoming a 'kangaroo court'.[12] The answer was to bring in international experts to help draft a Statute for a new court, seeking to introduce the highest standards already adopted by the international tribunals. Judges and lawyers were trained in these standards. The framework was good but the security situation meant that it was impossible to conduct the trials in the open manner that had been hoped and, whatever the justice of the verdicts reached, the manner of Saddam Hussein's execution made it look as if vengeance was taking control.

It would obviously not have been possible to conduct trials in the Balkans at the time the Tribunal for the Former Yugoslavia was established as the conflict was still ongoing but now, with the Tribunal closing down, more and more cases are being started in or transferred to local courts. In Rwanda, whilst the conflict was over, the infrastructure was not present to enable local trials to take place and indeed it must be doubted whether any such trials could have been conducted impartially. The appalling scenes when in the early days, some of the unfortunate inhabitants of Kigali prison were taken out, placed on trial for a few hours and then executed in public, graphically illustrated the point. Yet, again, the international tribunal was limited in what it could do and Rwanda has now reverted to traditional justice in the form of the Gacaca courts.

In Sierra Leone, a middle way was followed with a 'mixed' Tribunal of international and Sierra Leonean judges. Mixed tribunals of differing types have also been used in Kosovo, East Timor and now Cambodia. Whatever solution is adopted, whether international, mixed or local, there will need to be international assistance at the grass roots level. No country rising out of conflict has the capability to conduct such trials unaided and the trials will need to be accompanied by some other means of dealing with lesser actors. In most post-conflict societies, everybody played some part whether as perpetrator, accessory or victim.

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[12] See Charles Garraway, 'The Statute of the Iraqi Special Tribunal: A Commentary', in Susan Breau and Agnieszka Jachec-Neale, *Testing the Boundaries of International Humanitarian Law* (London, British Institute of International & Comparative Law 2006), p. 154.

Pressures to introduce measures of transitional justice must also not be allowed to counter the restoration of the ordinary domestic criminal justice system. This too is a vital element of post conflict planning. Nature abhors a vacuum and if there is no legal order, combatants will be replaced by criminals – indeed combatants may morph into criminals. Much of modern day conflict, particularly in civil wars, is intimately linked to crime and the end of conflict does not end the crime. IRA protection rackets did not cease with the ceasefire in Northern Ireland and in Kosovo and other Balkan areas, the warlords soon diversified into criminal gangs.

However, a criminal justice system cannot be rebuilt overnight. In Afghanistan, even today, up to half of all prosecutors have no or only rudimentary legal training. Some even lack secondary education – hardly surprising in a country that has had its educational system destroyed for decades. The conflict may have corrupted the existing legal system into something that is simply not workable or, as in Kosovo or East Timor, where the justice system was run by the previous regime, Serbs and Indonesians, it may simply have ceased to exist.

For the soldier on the ground in such a situation, this raises a serious problem. How does he deal with the looter, the rapist or the murderer? If he detains them, to whom does he hand them over? If they reappear the next day continuing their activities, what does he do then? These problems are exacerbated if that soldier is not a local but a member of an international force. We have already looked at some of the detention issues that arise.

Reform of a criminal justice system is not easy. It requires expenditure of both manpower and resources. Manpower is needed in the form of police, lawyers, judges and prison guards whilst facilities are required both to detain suspects and to conduct trials. Initially, this again may have to come from international sources and there can be two ways, at least, of conducting this. First, where there are no local structures in place at all, it may be necessary for the international presence to replace the local authorities until such time as they are capable of taking over. Alternatively, where local structures are in place but fragile, it may be possible for an international presence to bolster those local resources and assist them to build themselves up. Whichever option is selected, it is important that an appropriate legal framework is in place. Those who wish to uphold the law must be subject to the law and one of the criticisms made of the international presence in Kosovo was that it was unaccountable.

The Brahimi Report[13] suggested that there should be some form of international criminal law framework which could be used in post conflict situations where the local structures were not in place or unusable. Studies have looked into this but so far, it has proved politically and technically impossible to agree such a framework. However, something needs to be done if conflict is not to be replaced with crime. The warlords will then turn into crime bosses and the fear is that they will then gain political power so that the end is not much better than the beginning.

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[13] See Report of the Panel on United Nations Peace Operations (The Brahimi Report), August 2000, accessed at <http://www.un.org/peace/reports/peace_operations/>.

5. Conclusion

The border between war and peace has long since turned into a quagmire. There is no neat border and there is a great need for restoration of both governance and the rule of law. This cannot be done overnight and there may well be a need for interim provisions and international support. The international response is often military, either because they are already there in the form of an intervention force, or because the military is seen as the most available asset. And yet the military are ill suited to post conflict reconstruction in this sense. The legal regimes governing their actions are unclear and may lead to an excessive use of force. On the other hand international police, whether gendarmerie or constabulary, may be better suited to the tasks being more trained in law and order issues as opposed to the conduct of conflict. However, in situations where violence still continues at a high level as in Afghanistan today, clearly military forces will be required.

Nevertheless, if such forces are deployed it must be clear what are their legal powers and what is their entitlement to use force. Their deployment must be looked at in a holistic fashion so that if, for example, they are authorized or required to detain people, the infrastructure is in place to enable such people to be detained and appropriately dealt with. If this is not so, the temptation will be for the soldiers to develop their own system of justice which will inevitably lead to the sort of excesses seen in Somalia and Iraq.

Is there a need for a *jus post bellum*? Certainly, for the soldier on the ground in a post conflict situation there is a need for legal clarity. Whilst Rules of Engagement go some way to provide that, they need to reflect the law and if the law is unclear, then the rules may be as well which is disastrous. Fear of legal action may constrain soldiers in circumstances where the 'bad guys' can then take advantage. Certainly, the differing standards to be applied in international humanitarian law and human rights law cause difficulties in those grey areas which are neither peace nor war. Peace does not come rising straight out of the conflict but emerges slowly as violence ebbs away. There is a need to transition into peace. In the same way there may be a need for a legal regime to cover that transition period. Whether it is *jus post bellum* or something else is not the question. The current world order is such that there are many seeking to take advantage of gaps and uncertainties in law in general and in international law in particular. We certainly need a coherent structure which covers violence at all levels to assist those tasked with restoring normality to abnormal situations. That may be the challenge of the 21st century.

Chapter 9
ARE HUMAN RIGHTS NORMS PART OF THE JUS POST BELLUM, AND SHOULD THEY BE?

Ralph Wilde*

Abstract
The practice of complex post-intervention administration or occupation regimes, from the Balkans to Iraq and Afghanistan, raises the question as to whether and to what extent human rights law has and should have a role to play in the applicable legal framework. Are human rights norms part of what might be termed the jus post bellum, and should they be? The first part of this two-part contribution maps out the contours of what is at stake on the potential applicability of human rights norms in extraterritorial post bellum situations, highlighting some of the important questions that need to be addressed in establishing whether, and to what extent, the jus post bellum has a human rights law component. The second part of the piece then addresses one of the entry-level issues – should international human rights law be in play as part of this legal regime – in more detail, considering how certain arguments of principle in play here have been treated in the international jurisprudence to date.

Introduction

Contemporary concerns in popular discourse about supposed 'legal black holes' in places like Guantánamo Bay and secret CIA interrogation centres abroad reflect the new prominence that has been given to the question of the application of human rights law extraterritorially. This question is of course not actually new, and has been in play for some time in certain contexts, for example Israel and the Occupied Palestinian Territories. Nonetheless, the present moment is an interesting and important time to consider it: some of the key states that would be subject to the law here make various arguments refuting applicability, the case law remains somewhat sparse, and the greater prominence given to concerns about human rights abuses by states abroad has lead to litigation where courts are attempting, with varying degrees of success, to provide a coherent treatment of the law. The practice of complex post-intervention administration or occupation regimes, from the Balkans to Iraq and Afghanistan, raises the question as to whether and to what extent human rights law has and should have a role to play in the applicable legal framework. Are

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human rights norms part of what might be termed the *jus post bellum*, and should they be?

A broad range of complex issues are raised by these questions, and it is not possible to address them all comprehensively in a piece of this length. Instead, both a general *tour d'horizon* of all the issues concerning the potential applicability of human rights norms in extraterritorial *post bellum* situations, and a specific treatment of one such issue, is offered. The first part of this piece maps out the contours of what is at stake, highlighting some of the important questions that need to be addressed in establishing the human rights component, if any, of a *jus post bellum*. The second part of the piece then addresses one of the entry-level issues – *should* international human rights law be in play as part of this legal regime – in more detail, considering how certain arguments of principle in play here have been treated in the international jurisprudence to date.

1. Key Issues at Stake

1.1 **Should human rights law apply?**

A fundamental site of contestation is whether human rights law *should* apply extraterritorially. It might be suggested, by way of criticism, that to consider such a question is to move into analysis of the law as it should be rather than the law as it is. But legitimate forms of intellectual enquiry on the law should not be limited to the law as it is; also crucial is the need to appraise critically why the law exists, what the law should cover and, on the basis of such enquiry, how the law should change.

Even with a focus exclusively on the law as it is, the normative question of whether the law should apply requires evaluation, since one must consider what the object and purpose of international human rights law is in this regard. The norms of treaty interpretation, for example, require a consideration of the 'object and purpose' of the instrument in question when construing the meaning of the substantive norms contained within it.[1]

Indeed, this form of enquiry is especially significant for issues where the relevant provisions are on their face unclear, the cases and other authoritative commentary provide only limited assistance, and state practice is not particularly helpful in suggesting a clear, consistent and unified position. As will be explained below, all of these elements are present in the case of the extraterritorial application of human rights law.

The normative question has various aspects, concerning issues of principle and those of a practical nature. One relevant issue of principle is the idea of the social contract: rooting the requirement of rights and their protection through law in the contract between members of the community and the state, which in turn pro-

[1] See Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS*, Vol. 1155, p. 311, Art. 31(a).

vides the legitimacy for the state.[2] A traditional basis on which the community has been understood is in terms of nationality. Contractual theories, by definition, do not address requirements of justice arising in the context of the interaction between the community (and its officials) and individuals who do not belong to it. When 'belonging' is defined according to nationality, foreigners are left outside the frame. Thus, John Locke excludes foreigners from the social contract and the protection of citizenship rights:

> '… foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet do not thereby come to be subjects or members of that common-wealth.'[3]

Although ideas of rights and their protection through law have shifted so that most international law rights guarantees are not now understood as being tied to citizenship,[4] contemporary rights discourse is perhaps still focused predominantly on the nexus between the state and its *territory*. John Rawls' contractarian theory of justice, for example, concerns 'the basic structure of society conceived for the time being as a closed system isolated from other societies.'[5]

Another relevant issue of principle is the right of self-determination of those in the occupied/administered territory.[6] It might be asked here whether it

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[2] See, e.g., T. Hobbes, *Leviathan* (1651), R. Tuck (ed.), Cambridge, Cambridge University Press, 1996; J. Locke, *Two Treatises of Government* (1690), P. Laslett (ed.), Cambridge, Cambridge University Press, 1988; J. Rawls, *A Theory of Justice*, rev. edn., Cambridge MA, Harvard University Press, 1999.

[3] Locke, *supra* n. 2, p. 349.

[4] In international human rights law, the shift away from nationality is effected through conceiving human rights obligations in relation to the state's 'jurisdiction' rather than its own nationals. In the words of the UN Human Rights Committee, discussing the International Covenant on Civil and Political Rights, 'each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone … irrespective of his or her nationality or statelessness'; Human Rights Committee, *General Comment No. 15: The Position of Aliens under the Covenant* (1986), para. 1, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1 (1994), at 18. For the Covenant itself, see International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, *UNTS*, Vol. 999, p. 171. The preamble of the American Declaration of the Rights and Duties of Man states that 'the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality'; American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948), preamble. On the rights of aliens in international human rights law, see, for example, Human Rights Committee, *General Comment No. 15* (above), *passim.*

[5] Rawls, *supra* n. 2, p. 7.

[6] On self-determination, see, e.g., UN Charter, Arts. 1(2) and 55; ICCPR (*supra* n. 4), Art. 1, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, *UNTS*, Vol. 993, p. 3, Art. 1; GA Res. 1541 (XV), 15 December 1960, Annex; GA Res. 1514 (XV), 14 December 1960; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*

compatible with this right for the foreign state's own human rights obligations to be, in a sense, imposed on the population of the occupied territory. Within this general question, it is necessary to consider whether a distinction should be made between universal standards and/or standards binding on both the occupied territory and the occupying state, on the one hand, and standards binding only on the latter entity and/or conceived with a particular, spatially-defined political community in mind, such as the European Convention on Human Rights (ECHR) and its Protocols, on the other hand.[7]

A further issue of principle is the idea of the 'rule of law' which is at the heart of arguments seeking to avoid a 'legal black hole' in certain extraterritorial situations. This will be addressed in detail below.[8]

The entry level question of whether human rights law should apply also implicates various issues of a practical nature. Would the application of human rights norms somehow prevent an occupying power from doing all it needs to given the special policy requirements in the occupation context? For example, does one of the key elements for permissible derogations in the main human rights treaties on civil and political rights – that there is a war or public emergency threatening the life of the nation – only apply to domestic emergency situations, thereby preventing the state from being able to enter derogations in relation to its activities abroad, in turn preventing it from taking all the measures necessary in the occupation context?[9]

(South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 16; *Western Sahara, Advisory Opinion, ICJ Reports 1975*, 12; *Reference re Secession of Quebec*, Supreme Court of Canada, 28 August 1998, [1998] 2 RCS 217, 37 *ILM* (1998), p. 1340. The academic commentary is voluminous. See, e.g., the following: W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York, Nellen Publishing Co. 1977); H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, University of Pennsylvania Press 1990); J. Crawford (ed.), *The Rights of Peoples* (Oxford, Oxford University Press 1992); A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press 1995); K. Knop, *Diversity and Self-Determination in International Law* (Cambridge, Cambridge University Press 2002); J. Crawford, *The Creation of States in International Law*, 2nd edn. (Oxford, Oxford University Press 2006), pp. 108–128; A. Cassese, 'The Self-Determination of Peoples', in L. Henkin (ed.), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), p. 92; C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff 1993); C. Drew, *Population Transfer: The Untold Story of the International Law of Self-determination*, unpublished doctoral thesis, LSE 2006 (on file at Senate House Library, University of London); A. Bayefsky (ed.), *Self-determination in International Law: Quebec and Lessons Learned* (The Hague, Kluwer 2000).

[7] The Preamble to the European Convention on Human Rights states that '[t]he governments signatory hereto, being members of the Council of Europe, … [b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration …'; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, *ETS* No. 5. ECHR jurisprudence frequently references this 'common heritage' when construing the meaning of treaty provisions. See, e.g., *Golder* v. *United Kingdom*, Appl. No. 4451/70, European Court of Human Rights, *Series A*, No. 18 (1975), para. 34.

[8] See below, section 3.

[9] On derogations, see ICCPR, *supra* n. 4, Art. 4; ECHR, *supra* n. 7, Art. 15; American Convention on Human Rights (ACHR), 22 November 1969, OAS Treaty Series No. 36, Art. 27. On this area of the

Moreover, would the requirement of the provision of remedies flowing from applicability of human rights law be impractical – would this lead to overstretch on the part of national and international judicial bodies concerned with human rights, and are national courts, given their remoteness from the theatre of operations, capable of handling cases concerning actions abroad?[10]

It is of course difficult to approach these issues in the abstract, since much depends not on whether human rights law applies, but rather what it would require were it to apply, something which is in part mediated by the interplay between human rights law and other areas of law also applicable in the occupation context. This interplay issue will be addressed further below.[11]

1.2 **Methodological challenges**

The view one takes as to whether human rights law applies extraterritorially, like any legal enquiry, depends significantly on the methodological approach one adopts.

In seeking to interpret human rights treaties the standard methodological choice between an originalist and teleological approach has to be made. With the ECHR, for example, is one to look only at the original purpose of the Convention on the issue, whatever that might be, as the European Court of Human Rights appeared to favour in the *Banković* case concerning the NATO bombing of what was

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law, see, for example, *Aksoy* v. *Turkey,* Appl. No. 21987/93, European Court of Human Rights, *Reports 1996-VI*; *Brannigan and McBride* v. *United Kingdom*, Appl. Nos 14553/89 and 14554/89, European Court of Human Rights, *Series A*, No. 258 (1993); *Brogan* v. *United Kingdom*, Appl. No. 11209/84, European Court of Human Rights, *Series A*, No. 145 (1988); *Ireland* v. *United Kingdom*, Appl. No. 5310/71, European Court of Human Rights, *Series A*, No. 1 (1978); *Cyprus* v. *Turkey*, Appl. Nos 6780/74 and 6950/75, European Commission of Human Rights (1976), *European Human Rights Reports*, Vol. 4 (1976), p. 482; *Denmark, Norway, Sweden and Netherlands* v. *Greece*, Appl. Nos 3321/67; 3322/67; 3323/67; 3344/67, European Commission of Human Rights, *Yearbook of the European Convention on Human Rights*, Vol. 12 (1969), p. 1; *Lawless* v. *Ireland*, European Court of Human Rights, *Series A*, No. 3 (1961); *Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87*, Inter-American Court of Human Rights, *Series A*, No. 9 (1987); *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87*, Inter-American Court of Human Rights, *Series A*, No. 8 (1987); *Landinelli Silva* v. *Uruguay*, Communication No. 34/1978, Human Rights Committee, UN Doc. CCPR/C/12/D/34/1978 (1981); Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 2; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Ch. 16 (London, Butterworths 1995); R. Higgins, 'Derogations under Human Rights Treaties', 48 *BYIL* (1976-1977), p. 281; S. Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights', 15 *Oxford Journal of Legal Studies* (1995), p. 69. On derogations in relation to extraterritorial situations, see the comment by the European Court of Human Rights in *Banković* v. *Belgium and 16 Other Contracting States*, Appl. No. 52207/99, European Court of Human Rights [Grand Chamber], Admissibility Decision, *Reports 2001-XII*, para. 62.

[10] On the provision of remedies, see, e.g., ICCPR, *supra* n. 4, Art. 2(3); ECHR, *supra* n. 7, Art. 13; ACHR, *supra* n. 9, Art. 25; cf., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, *UNTS*, Vol. 1465, p. 85, Arts 13 and 14. The Convention on the Rights of the Child (CRC), GA Res. 44/25, 20 November 1989, *UNTS*, Vol. 1577, p. 3, contains no explicit requirement of provision of a domestic remedy for violation.

[11] See below, section 2.5.

then called the Federal Republic of Yugoslavia in 1999?[12] Or, alternatively, must one also take on board the notion of the treaty articulated in the *Tyrer* case as a 'living instrument, which … must be interpreted in the light of present-day conditions', a dictum which, although not made in the context of an extraterritorial situation, is regarded as a general principle of Convention interpretation?[13]

And what is the relevance of state practice to the enquiry? Again in the *Banković* case the European Court cited the general lack of derogations entered by states in relation to certain foreign activities as somehow being indicative of a view taken by them that treaty obligations do not apply extraterritorially to the activities in question.[14] Drawing such a conclusion simply from this evidence is, however, difficult. It may well be that the states concerned did not consider their obligations under the Convention to apply for reasons other than the foreign locus of the acts in question. For instance, those states could have considered that the Convention had somehow been overridden by humanitarian law, seen as constituting the *lex specialis* applicable in the circumstances (an issue which will be explored further below), or perhaps officials had simply not considered the issue, especially if the activity in question was short-lived. It might even be speculated that states took the view that the requirement of a declaration of derogation meant something different in the foreign context, with the existence of an international mandate for their foreign operations perhaps somehow constituting an implicit activation of the derogation regime without the need for an explicit statement to this effect.

These and other issues of policy and method feed into the key questions that need to be asked about the meaning and the scope of the law in this area.

1.3 **Does it apply?**

The first question about the meaning of the law is, of course, whether human rights treaties apply extraterritorially at all.

A secret memo prepared for the US Department of Defense in March 2003 and leaked in June 2004 reported that the United States has 'maintained consistently' that the International Covenant on Civil and Political Rights

> '… does not apply outside the United States or its special maritime and territorial jurisdiction, and … does not apply to operations of the military during an international armed conflict.'[15]

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[12] *Banković* v. *Belgium, supra* n. 9, in particular paras. 63-65.

[13] *Tyrer* v. *United Kingdom*, Appl. No. 5856/72, European Court of Human Rights, *Series A*, No. 26 (1978), para. 31. See also the cases cited in *Banković, supra* n. 9, para. 64.

[14] Ibid., para. 62.

[15] US Department of Defense, 'Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations', 6 March 2003, available at <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf>, p. 6 (last visited 28 August 2006). Denials of extraterritorial applicability of the ICCPR (*supra* n. 4) and the CAT (*supra* n. 10) have been made officially. In its statement before the UN Human Rights Committee in 2006, the United States reiterated its 'long-standing view […] that the Covenant by its very terms does

This statement makes two complementary suggestions of non-applicability. Treating them in reverse order, in the first place is a suggestion concerning subject-matter: human rights law does not apply in situations of armed conflict. The implication of this contention is that the laws of war, on the one hand, and human rights law on the other, are mutually exclusive in terms of the situations in which they apply. When one area of law is in play, the other is not. The laws of war apply only in times of 'war' and military occupation; human rights law applies only in times of 'peace'.

Whereas the first contention is correct,[16] the second would not seem to be tenable given the affirmation of applicability by several authoritative sources, including the International Court of Justice (ICJ) in the *Nuclear Weapons* and *Wall* Advisory Opinions.[17]

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not apply outside of the territory of a State Party'. Matthew Waxman, Head of US Delegation, Principal Deputy Director of Policy Planning, Department of State, 'Opening Statement before the Human Rights Committee', 17 July 2006, available at <http://geneva.usmission.gov/0717Waxman.html>. The US position on the matter is detailed in Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Third periodic reports of States parties due in 2003: United States of America*, UN Doc. CCPR/C/USA/3, 28 November 2005, Annex I, 'Territorial Scope of Application of the Covenant', available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf>. According to the UN Committee Against Torture, an equivalent position in relation to the CAT was articulated by the United States in deliberations before them in 2006, where the United States took the view that provisions in the CAT applicable to the United States in its 'jurisdiction' were 'geographically limited to its own *de jure* territory' (Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America*, UN Doc. CAT/C/USA/CO/2, 18 May 2006 (advanced unedited version available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>, para. 15).

[16] On the scope of application of international humanitarian law see, common Art. 2 of the 1949 Geneva Conventions (Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, *UNTS*, Vol. 75, p. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, *UNTS*, Vol. 75, p. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, *UNTS*, Vol. 75, p. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *UNTS*, Vol. 75, p. 287). On 'belligerent occupation', see Art. 43, Hague Regulations Respecting the Laws and Customs of War on Land (annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, *Martens Nouveau (Series 3)*, Vol. 3, p. 461.

[17] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, ICJ Reports 1996*, p. 226 at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *ICJ Reports 2004*, p. 136, at paras. 104-106. On the relationship between humanitarian law and international human rights law, see also *Coard* v. *United States of America*, Case 10.951, Inter-American Commission of Human Rights, OEA/ser.L/V/II.106, doc.3rev. (1999); *Salas and Others* v. *United States of America*, Case 10.573, Inter-American Commission of Human Rights, OEA/ser.L/V/II.85, doc.9rev. (1993), reprinted in 123 *ILR* 1; R. Provost, *International Human Rights and Humanitarian Law* (Cambridge, Cambridge University Press 2002); D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (The Hague, Martinus Nijhoff 1997). See also L. Doswald-Beck & S. Vité, 'International Humanitarian Law and Human Rights Law', 293 *IRRC* (1994), p. 94; Jochen Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation', 28 *Israel Yearbook of Human Rights* (1998), p. 1; F. Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts', 31 *Revue de Droit Pénal Militaire et de Droit de la Guerre* (1992), p. 119; '50th Anniversary of the Universal Declaration of Human Rights: Human Rights and International Humanitarian Law', 324 *IRRC* (1998), p. 1.

A typical affirmation of the applicability of human rights law in times of 'war' comes from the decision of the Inter-American Commission of Human Rights in the *Coard* case of 1999, which concerned the detention of seventeen individuals by US military forces during the 1983 US invasion of Grenada.[18] The Commission stated that:

> '… [while international] humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a 'common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,' and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict.'[19]

Even if, then, human rights law can apply in armed conflict situations, what of the other supposed contention, that it does not apply extraterritorially?

Most of the main human rights treaties on civil and political rights do not conceive state responsibility simply in terms of the acts of states parties, as is the case, for example, in common Article 1 of the Geneva Conventions, in which contracting parties undertake 'to respect and to ensure respect for the present Convention in all circumstances.'[20] Instead, responsibility is conceived in a particular context: the state's *jurisdiction*. The state is obliged to secure the rights contained in the treaty only within its 'jurisdiction'.[21] Thus a nexus to the state – termed jurisdiction – has to be established before the state act or omission can give rise to responsibility.

The consistent jurisprudence of the relevant international review mechanisms and the ICJ has been to interpret jurisdiction as operating extraterritorially in certain circumstances.[22] A blanket denial of extraterritorial applicability is very difficult to sustain in the face of this extensive authority.

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[18] For the background to the case, see *Coard*, *supra* n. 17, paras. 1-4.

[19] Ibid., para. 39 (footnotes omitted).

[20] Common Art. 1, 1949 Geneva Conventions (*supra* n. 16).

[21] See, e.g., ICCPR, *supra* n. 4, Art. 2; Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, *UNTS*, Vol. 999, p. 171, Art. 1; ECHR, *supra* n. 7, Art. 1; ACHR, *supra* n. 9, Art. 1; CRC, *supra* n. 10, Art. 2; CAT (*supra* n. 10), Art. 2. Some obligations are limited to the state's territory: see, for example, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 16 September 1963, *ETS* No. 46, Art. 3. Note that the ECHR and its Protocols have separate provisions on applicability to overseas territories; see, e.g., ECHR, Art. 56.

[22] *Wall* Advisory Opinion, *supra* n. 17, paras. 107-113; Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 10; *Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, Human Rights Committee, Supp. No. 40, at 176, UN Doc. A/36/40 (1981); *Celiberti de Casariego* v. *Uruguay*, Communication No. R.13/56, Human Rights Committee, Supp No. 40, at 185, UN Doc. A/36/40 (1981); *Drozd and Janousek* v. *France and Spain*, Appl. No. 12747/87, European Court of Human Rights, 14 *EHRR* (1992), p. 745; *Loizidou* v. *Turkey*, Appl.

1.4 What is the threshold test?

In the jurisprudence, the key question is not whether human rights law applies abroad, but in what circumstances. The term 'jurisdiction' has been understood in the extra-territorial context in terms of the existence of a connection between the state, on the one hand, and either the territory in which the relevant acts took place – a *spatial* connection – or the individual affected by them – a *personal* connection – but within these two categories there is considerable uncertainty due to the sparse nature of case law, and a variety of views taken by states and expert commentators.[23]

No. 15318/89, European Court of Human Rights [Grand Chamber], Preliminary Objections, *Series A*, No. 310 (1995) (hereinafter '*Loizidou (Preliminary Objections)*'), para. 62; *Loizidou* v. *Turkey*, Appl. No. 15318/89, European Court of Human Rights [Grand Chamber], Merits, *Reports 1996-VI* (hereinafter '*Loizidou (Merits)*'), paras. 52-56; *Cyprus* v. *Turkey*, Appl. No. 25781/94, European Court of Human Rights [Grand Chamber], Reports 2001-IV, para. 77; *Banković* v. *Belgium*, *supra* n. 9; *Issa and Others* v. *Turkey*, Appl. No. 31821/96, European Court of Human Rights, Judgment of 16 November 2004, available at <www.echr.coe.int>; *Ilascu and Others* v. *Moldova and Russia*, Appl. No. 48787/99, European Court of Human Rights [GC], *Reports 2004-VII*; Committee Against Torture, *Conclusions and Recommendations: United States of America*, *supra* n. 15, para. 15. For academic commentary see, e.g., C. Lush, 'The Territorial Application of the European Convention on Human Rights: Recent Case Law', 42 *ICLQ* (1993), p. 897; T. Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL* (1995), p. 78; P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Torino, Giappichelli 2002); M. Happold, '*Bankovic* v. *Belgium* and the Territorial Scope of the European Convention of Human Rights', 3 *EHRLR* (2003), p. 77; A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *EJIL Law* (2003), p. 529; K. Altiparmak, 'Bankovic: an obstacle to the application of the European Convention on Human Rights in Iraq?', 9 *Journal of Conflict and Security Law* (2004), p. 213; S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror'', 857 *IRRC* (2005), p. 39; M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005), p. 119; O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', NYU School of Law, Center for Human Rights and Global Justice Working Paper No. 9, 2005, available at <http://www.nyuhr.org/docs/wp/DeSchutter%20Globalization%20and%20Jurisdiction.pdf>; M. Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *NILR* (2005), p. 349; R. Wilde, 'Legal 'Black Hole'?: Extraterritorial state action and international treaty law on civil and political rights', 26 *Michigan Journal of International Law* (2005), p. 739; R. Wilde, 'The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', 10 *EHRLR* (2005), p. 115; A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006), p. 580; R Wilde, 'Casting Light on the 'Legal Black Hole': Some Political Issues at Stake', 5 *EHRLR* (2006), p. 552, and the contributions in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp-Oxford, Intersentia 2004).

[23] On the 'spatial' connection, see, e.g., *Wall* Advisory Opinion, *supra* n. 17, paras. 107-113; Human Rights Committee, *General Comment No. 31*, *supra* n. 22, para. 10; *Loizidou (Preliminary Objections)*, *supra* n. 22, para. 62; *Loizidou (Merits)*, *supra* n. 22, para. 52; *Cyprus* v. *Turkey*, *supra* n. 22, paras 75-77; *Banković* v. *Belgium*, *supra* n. 9, generally, and in particular paras. 70 and 75; *Issa* v. *Turkey*, *supra* n. 22, paras. 69-70; *Ilascu* v. *Moldova and Russia*, *supra* n. 22, paras, 314-316; Committee Against Torture, *Conclusions and Recommendations: United States of America*, *supra* n. 15, para. 15. On the 'personal' connection, see, e.g., Human Rights Committee, *General Comment No. 31*, para. 10; *Lopez Burgos* v. *Uruguay*, para. 12.3; *Celiberti de Casariego* v. *Uruguay*, para. 10.3; *Banković* v. *Belgium*, generally, and in particular para. 75; *Issa* v. *Turkey*, para. 71; Committee Against Torture, *Conclusions and Recommendations: United States of America,* para. 15. For commentary, see the academic sources listed in the preceding footnote.

1.5 Interface with other areas of law

Assuming the jurisdictional test is met, it is then necessary to establish how the human rights norms in play interface with other potentially applicable areas of law. Here one must take account of special modalities mediating the interplay issue specific to the other areas of law, such as the relevance of Article 103 of the UN Charter as far as Security Council-authorized action is concerned, and the *lex specialis* status that humanitarian law has in the armed conflict context.[24]

1.6 How it is to be understood in the extraterritorial context

Assuming that it has been determined how, if at all, the meaning of human rights law has been mediated through the interplay of this area of law with other applicable legal regimes, one can seek to determine what human rights law substantively amounts to in the extraterritorial context.

All things being equal, does human rights law require the state to do, or not do, the same things in occupied territory as it does in its own territory? Relevant factors here include the profoundly different political basis for the state administrative presence, where it is acting as a foreign occupier rather than as representative of the people in the territory.

Should the nature of the control exercised by the state somehow mediate the scope of its obligations? Should it matter that the state is not able to influence what happens in the foreign territory to the same extent as it can in its own territory? How might actions that might be considered justified by the special circumstances of insecurity and conflict that often prevail in the extraterritorial locus, for example security detentions, fit within what is permissible in human rights law?

These and other issues feed into the question of what rights themselves mean in the occupation context, and how derogation provisions might be under-

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[24] On interplay with Security Council authority, see the decisions of the European Court of First Instance in Case T-315/01, *Kadi* v. *Council of the European Union and Commission of the European Communities*, judgment of 21 September 2005 and Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities*, judgment of 21 September 2005, both available at <http:www.curia.eu.int>; see also *R (on the application of Al Jedda)* v. *Secretary of State for Defence* [2005] EWHC 1809 (Admin) (High Court, 12 August 2005); *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2006] EWCA Civ 327 (Court of Appeal, 29 March 2006). On the interplay with the law of armed conflict when the latter is the *lex specialis*, see *Legality of the Threat or Use of Nuclear Weapons*, *supra* n. 17, para. 25. On the relationship between different areas of law more generally, see 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (finalized by Martti Koskenniemi)', UN Doc. A/CN.4/L.682, 13 April 2006; R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', Keynote speech delivered at the Spring Meeting of the International Law Association, British Branch, 4 March 2006, reproduced in 55 *ICLQ* (2006), p. 791, D. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', paper delivered at the Spring Meeting of the International Law Association, British Branch, 4 March 2006, available at <http://www.law.harvard.edu/faculty/dkennedy/speeches/LegalOrders.pdf>.

stood, including the issue mentioned earlier about the requirement that the emergency 'threatens the life of the nation'. In the particular context of the ECHR, might the 'margin of appreciation', whereby the state's own determination as to the permissibility of restricting rights is deferred to, have special relevance in the foreign context?[25]

2. The Principled Case for Extraterritorial Applicability[26]

2.1 Introduction

So far this piece has been concerned with mapping out some of the main issues at stake concerning the applicability of human rights law to situations of foreign administration or occupation. The focus will now shift from the general to the specific, analyzing one of the issues highlighted earlier in more detail. The earlier discussion began with the entry level question of principle – should human rights law apply extraterritorially – and it was suggested that the answer to this question is important for any understanding of *whether* the law applies, for example because of its relevance to the general object and purpose test that one would consider when interpreting human rights treaties. This suggestion is bolstered by the fact that all the main international human rights law review bodies have themselves found it helpful to consider the 'should' question in their own analysis of the extraterritoriality issue. The remainder of this piece will consider what they have said in this regard, and how their comments feed into broader ideas of principle. Three such ideas will be identified and analyzed.

2.2 First general principle: double standard

The first idea can be found in dicta from the *Lopez Burgos* and *Celiberti de Casariego* communications to the UN Human Rights Committee, which concerned alleged abduction and detention by Uruguayan agents outside Uruguayan territory – in Brazil and Argentina respectively – and forced transportation to Uruguay.[27]

In its 1981 consideration of these cases, the Committee stated that the 'jurisdiction' test for the applicability of the ICCPR in Article 2

> '… does not imply that the State ... cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another

[25] On the margin of appreciation, see e.g., *Handyside* v. *United Kingdom*, Appl. No. 5493/72, European Court of Human Rights, *Series A*, No. 24 (1976); *Dudgeon* v. *the United Kingdom*, Appl. No. 7525/76, *Series A*, No. 45 (1981); *Christine Goodwin* v. *United Kingdom*, Appl. No. 28957/95, European Court of Human Rights [Grand Chamber], *Reports 2002-VI*. For criticism, see Marks, 'Civil Liberties at the Margin', *supra* n. 9.

[26] This is a revised version of some of the ideas discussed in Wilde, 'Legal 'Black Hole'?, *supra* n. 22).

[27] *Lopez Burgos* v. *Uruguay*, *supra* n. 22; *Celiberti de Casariego* v. *Uruguay, supra* n. 22.

> State, whether with the acquiescence of the Government of that State or in opposition to it.'[28]

The Human Rights Committee explained that its reason for this conclusion was the provision in Article 5(1) of the Covenant, which states that:

> '[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'[29]

The Committee concluded that

> '[i]n line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[30]

Here, the Committee offers a principled basis for conceiving human rights obligations extraterritorially: it would be 'unconscionable' if a *double standard*, whereby activities legally prohibited when committed within the state's territory but not legally prohibited if committed extraterritorially, subsisted *merely by virtue of the extraterritorial locus*. If this were the case, states would be able to evade legal responsibility simply by shifting their activities overseas.

2.3 Second general principle: indirect discrimination on grounds of nationality

The second general principle from the jurisprudence is found in a case from the Inter-American system and also a further statement by the UN Human Rights Committee. In the *Coard* case mentioned earlier, the Inter-American Commission of Human Rights stated that

> '[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.'[31]

When considering the meaning of 'jurisdiction' in Article 2(1) of the ICCPR, the Human Rights Committee in General Comment No. 31 looks back to its earlier observation in General Comment No. 15 that Covenant obligations operate with

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[28] *Lopez Burgos* v. *Uruguay*, *supra* n. 22, para. 12.3; *Celiberti de Casariego* v. *Uruguay*, *supra* n. 22, para. 10.3.

[29] Ibid., quoting ICCPR, *supra* n. 4, Art. 5(1).

[30] Ibid.

[31] *Coard, supra* n. 17, para. 37.

respect to 'all individuals, regardless of nationality or statelessness'.[32] This reiteration of an earlier assertion suggests that the general principle that human rights obligations are owed to all individuals, regardless of their nationality, applies not only to state action within its territory, but also to such action extraterritorially.

However, the context in which the earlier assertion is considered – in passages concerned with whether, not how, human rights law applies extraterritorially – perhaps suggest that they also speak to a general policy consideration that the non-nationality-basis for conceiving human rights protection is relevant when considering whether human rights law should apply extraterritorially.

Given that the majority of individuals affected by territorial state action are a state's own nationals, and the majority of such individuals affected by extraterritorial state action are aliens, to conceive 'jurisdiction' only territorially, even in circumstances where a state takes extraterritorial action, would, in effect, produce a distinction in protection as between nationals and aliens.

Since this distinction is adopted on the basis of a consideration – the enjoyment or lack of territorial sovereignty – that, in terms of whether or not state action impacts on the rights of individuals, is irrelevant, the unequal treatment it produces as between nationals and foreigners is of an arbitrary nature. As such, it runs counter to the general concept mentioned earlier of human rights being rooted in individual humanity rather than the enjoyment of nationality. It might be said, then, that this concept requires extraterritorial activities to be brought within the frame of human rights obligations, to avoid an arbitrary distinction in the operation of such obligations from subsisting as between nationals and foreigners.

2.4 **Third general principle: the 'legal black hole'**

The third general consideration from the jurisprudence speaks to a characterization that has become commonplace as a pejorative label used by critics of the detention and interrogation facilities in Guantánamo Bay: that this situation is, in the words of British Law Lord Johan Steyn (stated extra-judicially), a 'legal black hole',[33] or, in the words of Professor Harold Koh, an 'extra legal zone'.[34]

Of course, the notion that Guantánamo Bay, and other forms of territorial administration by a foreign state or group of foreign states, are legal vacuums is absurd: the law plays a major role in constituting these arrangement; in Guantánamo, for example, most fundamentally in providing, through the treaty between the United

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[32] Human Rights Committee, *General Comment No. 31, supra* n. 22, para. 10. See also Human Rights Committee, *General Comment No. 15, supra* n. 4.

[33] J. Steyn, 'Guantanamo Bay: The Legal Black Hole', Twenty-Seventh FA Mann Lecture, British Institute of International and Comparative Law, London, 25 November 2003, reprinted in 53 *ICLQ* (2004), p. 1.

[34] H.H. Koh, 'Rights to remember', *The Economist*, 30 October 2003, available at <http://www.economist.com/opinion/displayStory.cfm?story_id=2173160>.

States and Cuba, the entitlement of the United States to administer the area on which it operates the Naval Base housing the detainees.[35]

In reality, commentators are concerned not with the absence of all law, but with the absence or insufficient application of a particular area of law: the full range of necessary legal standards that should apply whenever the state exercises control over territory and the individuals within it, including those standards governing the detention of individuals, and independent remedies for enforcing those standards. So journalists Dana Priest and Barton Gellman describe the secret CIA-operated overseas detention centers as being places 'where U.S. due process does not apply',[36] journalist Don Van Natta Jr. describes these facilities as 'isolated locations outside the jurisdiction of American law',[37] Lord Steyn stated that the detainees in Guantánamo Bay were 'beyond the rule of law, beyond the protection of any courts',[38] and in the *Abbasi* case which concerned the UK government's efforts in relation to one of its nationals then being held in Guantánamo Bay, Feroz Abbasi, the English Court of Appeal stated that

> '[w]hat appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention … with no opportunity to challenge the legitimacy of his detention before any court or tribunal.'[39]

As a term of critique, the 'legal black hole' idea speaks to a fear that, when states move away from their own territories, they somehow also affect a partial or complete move away from the arena of necessary legal regulation as far as the treatment of individuals is concerned.

To use this term as a critical device is of course to implicitly invoke the liberal notion of the rule of law: that is to say, the idea that the executive should be bound by law as a means of addressing the need for checks and balances in the state's treatment of the individual, beyond those provided through the democratic accountability of periodic elections. In a now classic statement of this idea, James Madison wrote, in the gendered language of his day:

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[35] See Agreement Between the United States of America and Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 16-23 February 1903, Art. I, UST No. 418, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm>; Agreement Between the United States of America and Cuba on the Lease of Certain Areas for Naval or Coaling Stations, 2 July 1903, UST No. 426, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba003.htm>; and Treaty Between the United States of America and Cuba, 29 May 1934, UST No. 866, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba001.htm>.

[36] D. Priest and B. Gellman, ''Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities', *Washington Post*, 26 December 2002, p. A1.

[37] D. Van Natta Jr., 'Questioning Terror Suspects in a Dark and Surreal World', *New York Times*, 9 March 2003.

[38] Steyn, *supra* n. 33, p. 8.

[39] *R (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ. 1598, para. 66.

> '[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.'[40]

The particular 'legal black hole' commentators have in mind is conceived as problematic, therefore, because it amounts to the removal of one such auxiliary precaution.[41]

This idea seemed to be invoked in the *Cyprus* v. *Turkey* case,[42] which concerned Turkey's responsibility for the situation in northern Cyprus, which the state invaded and occupied in 1974 leading to the proclamation of the independent state of the Turkish Republic of Northern Cyprus (TRNC) in 1983.[43]

In its judgment, the European Court of Human Rights, having found that Turkey's obligations under the ECHR applied to it extraterritorially in Northern Cyprus, stated that

> 'Having regard to the applicant Government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.'[44]

In the later *Banković* case, mentioned above, which concerned the bombing of one of the main buildings of *Radio Televizije Srbije* (RTS) in Belgrade by a NATO aircraft during the 1999 bombing campaign of the then Federal Republic of Yugoslavia, not at that time a party to the ECHR,[45] the Court made the following statement on the issues implicated by its earlier dictum in *Cyprus* v. *Turkey*:

> '[i]t is true that, in its above-cited *Cyprus v. Turkey* judgment ... the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However ... that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards

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[40] J. Madison, *The Federalist No. 51* (1788), reprinted in *The Federalist* (Jacob E. Cooke (ed.)) (Middletown, Connecticut, Wesleyan University Press 1961), pp. 347 at 349.

[41] Further analysis on the invocation of the 'legal black hole' is offered in R. Wilde, 'Casting Light on the 'Legal Black Hole'', *supra* n. 22.

[42] *Cyprus* v. *Turkey*, *supra* n. 22, para. 78

[43] See the explanation of the facts ibid.; see also *Loizidou* v. *Turkey (Preliminary Objections), supra* n. 22.

[44] *Cyprus* v. *Turkey, supra* n. 22, para. 78.

[45] *Banković, supra* n. 9, paras. 9-11. On the bombing campaign generally, see ibid., paras. 6-8.

> and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.
>
> [...]
>
> ... the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.'[46]

Whereas the final sentence is an accurate description of the particular type of vacuum in rights protection at issue in the *Cyprus* v. *Turkey* case, it must be asked whether the Court is suggesting here that these particular circumstances are the *only* type of vacuum in rights protection that would validly give rise to a need for extraterritorial obligations to subsist.

The suggestion would be as follows: the only type of vacuum in rights protection caused by extraterritorial state action that is a valid consideration when understanding whether the human rights treaty obligations of the state taking the action should apply to it is action that, firstly, occurs in the territory of another party to the same treaty and, secondly, prevents the second state from fulfilling its obligations under that treaty.

Put differently, the vacuum has to be caused by another state party to the treaty not being able to fulfill its obligations under the treaty, rather than a broader notion of any state or non-state territorial entity (whether or not a party to that particular instrument) being prevented from safeguarding human rights in its territory (whether or not those rights are protected under the same treaty, or under other areas of international law, and/or domestic law).

This suggestion would seem to depend on an assumption that the only valid concern within human rights instruments about a vacuum in rights protection created by extraterritorial state action relates to obligations owed by another state party. How might such an assumption be sustained?

One basis is suggested by the Court's comments in *Banković* relating to the 'espace juridique'. It might be said that a broader approach also taking in action preventing non-parties from securing rights would contradict a separate policy proscription: that treaties are only intended to secure rights to individuals within the territories of states parties. Put differently, not only is the treaty binding only on states parties to it; also, only individuals within the territory of all these states par-

[46] Ibid., para 80 (footnote omitted).

ties – the 'legal space' of the treaty – can be rights holders under the instrument. Because the application of the treaty is limited to this 'legal space', it follows that the treaty can only be concerned with remedying a vacuum in rights protection if the vacuum relates to the obligations of a state whose territory forms part of this legal space.

This 'legal space' idea is, of course, germane for our analysis not only because of its potential effect on the 'vacuum' policy concern, but also because in a broader way it would serve as a block on the application of human rights treaties to extraterritorial state actions taking place outside the legal space of the contracting parties to these treaties. If correct, this general idea would mean that a particular action taken by one state outside its territory would take place in a 'legal black hole' as far as the human rights obligations owed by the first state under a treaty, if the territory in question is not within a state that is also a party to that treaty.

This would rule out, for example, the applicability of the ECHR to the United Kingdom in Iraq, and the applicability of all Israel's international human rights treaty obligations to its presence in the Palestinian territories.

Indeed, this potential is currently being invoked by the United Kingdom in relation to the application of the ECHR in Iraq, through government statements[47] and positions taken in the *Al Skeini* litigation concerning UK soldiers in Iraq before the English courts.[48]

Elsewhere I have argued that this is misconceived: a misunderstanding of what the Court said in both *Cyprus* v. *Turkey* and *Banković*, and flatly contradicted by cases before and after *Banković* which have considered the ECHR to be applicable to contracting states acting in foreign states not party to the Convention.[49]

If, then, the spatial applicability of human rights treaties is not actually necessarily limited to the territory of their contracting states (even such treaties are, obviously, limited to those states in terms of who is bound by the obligations they contain), it follows that the dictum of the European Court of Human Rights about avoiding a vacuum in *Cyprus* v. *Turkey* is best understood as highlighting one particular vacuum in protection that would validly give rise to a need for extraterritorial applicability, without prejudice to the possibility that other types of vacuum might also have this effect.

In *Cyprus* v. *Turkey* the applicants only needed to raise, and the Court only needed to pronounce upon, this particular vacuum in protection. To say that avoiding it is a legitimate concern is not to say that it is the only type of vacuum that should give rise to the extraterritorial application of human rights; rather, it is simply the type of vacuum that, in the words of the Court in *Banković*, 'has so far been

[47] The Rt. Hon Adam Ingram MP, Ministry of Defense, Letter to Adam Price MP, 7 April 2004, unpublished, on file with the author.

[48] See *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence* [2004] EWHC 2911 (Admin); *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence* [2005] EWCA Civ 1609; *R (on the application of Al-Skeini and others)* v. *Secretary of State for Defence* [2007] UKHL 26.

[49] See R. Wilde, 'The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights', *supra* n. 22.

relied on by the Court' in this regard. The juridical significance of the Court's comments in *Banković*, then, is limited to refuting the relevance of a concern about a particular type of vacuum in rights protection in relation to the facts of that case.

The Court's comments in *Banković* do not exclude the notion that the dictum in the *Cyprus* v. *Turkey* case speaks to a more general policy objective, applicable to any human rights treaty, that action by a state party outside its national territory (whether or not the sovereign in that territory is bound by the same human rights instrument) should not be allowed to create a 'vacuum' in legal human rights protection generally by preventing the existing sovereign from safeguarding legal rights in the territory concerned, whether or not that second entity is obliged to safeguard these legal rights under the particular human rights instrument at issue.

The invocation of this concern in the context of one state's obligations under a particular human rights treaty in circumstances where the obligations are also owed by the other state involved under the same treaty should not be taken to suggest that this is the only context in which this concern is relevant.

It would seem, then, that the 'legal black hole' concern finds some echo in Strasbourg case law. But does accepting the need for 'auxiliary protections', in the words of James Madison extracted above, necessarily require the wholesale application of international human rights law?

When the prisoner abuse scandal in Abu Ghraib prison in Baghdad, Iraq, broke in the Spring of 2004, UK Parliamentarian and human rights law expert Lord Anthony Lester submitted a written parliamentary question to the UK government asking …

> '… whether the Coalition Provisional Authority or the coalition forces are required by law to respect the fundamental human rights of Iraqi people, as defined in the bill of rights contained in the transitional administrative law for Iraq or otherwise; and if not, what recourse is available to the people of Iraq for breaches of those rights by the Authority or the forces.'[50]

Baroness Liz Symonds, a UK Foreign Office Minister, responded that

> '[t]he Coalition Provisional Authority (CPA) and the coalition forces as occupying powers in Iraq are required to conduct themselves in accordance with the rules of international law, which includes respecting the human rights of the Iraqi people. The CPA and the coalition are also responsible for upholding the law of the land, which until a new constitution has been agreed by the Iraqis is the Transitional Administrative Law (TAL). We take very seriously any allegations alleging breaches of human rights. Iraqis will have recourse to the Iraqi justice system for any infringements of their rights in the TAL. For incidents relating to UK personnel, it is standard practice for an independent investigation to

[50] Baroness Symons of Vernham Dean, Written Answer to Lord Lester 'Iraq: Transitional Administrative Law and Human Rights', 10 May 2004, Lords Hansard Vol. 661, Part No. 80, Columns WA9–10, question HL2545, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldhansrd/vo040510/text/40510w03.htm#40510w03_sbhd4> (last visited 29 August 2006).

> be undertaken if there is any doubt as to whether the appropriate rules of engagement have been adhered to. If an investigation concludes that there was wrongdoing on the part of UK personnel, appropriate disciplinary measures will be taken, including criminal proceedings where necessary.'[51]

In this statement, Baroness Symonds is invoking the two main areas of law most would accept are in play in the occupation context: international humanitarian law, when the test for the application of that law is met, and the local law. Might these areas of law provide the necessary 'auxiliary protections' so as to obviate the need for international human rights law to apply as a remedy to legitimate legal black hole fears?

As far as the 'law of the land', as Baroness Symonds calls it, is concerned, each situation of occupation is different, and one would need to know the answer to two central questions: first, does the local law apply to the foreign occupying state to the necessary extent and, second, are there modalities for enforcing this law and, if so, are they adequate in providing an effective remedy? As to the latter issue, in many military operations foreign troops enjoy immunities and privileges, barring them from being subjected to domestic legal enforcement. In Iraq, for example, these operate under CPA Order No. 17,[52] which like other CPA Orders continues in force in the post-CPA period under the Transitional Law.[53] As then acting UN High Commissioner for Human Rights Bertrand Ramcharan, describing this regime of immunity during the CPA period, noted:

> '[i]n effect, there is immunity for Coalition Forces personnel for any wrongful acts, including human rights abuses, committed in Iraq as far as Iraqi jurisdiction is concerned.'[54]

As far as international humanitarian law is concerned, clearly the law does contain certain basic protections, alongside specific safeguards for certain types of individuals, notably prisoners of war.[55] The key question, however, is whether these safeguards are sufficient to cover the range of issues that might arise in the occupation context.

The problem here is that in many situations of foreign territorial administration/occupation, the foreign state goes beyond the type of activity that international humanitarian law speaks to. With detainees, for example, the issue is not only how they are treated during periods of detention but, for non-combatant public order detentions, how long they are detained and, for all detainees who are subject

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[51] Ibid.

[52] Coalition Provisional Authority, Order No. 17, 27 June 2004, obtainable from <http://www.iraqcoalition.org/regulations/>, Section 2 and *passim.*

[53] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004 (obtainable from <http://www.cpa-iraq.org/government/TAL.html>, last visited 28 August 2006), Arts. 2, 3, 26.

[54] Report of the United Nations High Commissioner for Human Rights, 'The Present Situation of Human Rights in Iraq', 9 June 2004, UN Doc. E/CN.4/2005/4, para. 117.

[55] See, e.g., Geneva Convention III, *supra* n. 16.

to some kind of criminal prosecution, whether or not that process conforms to due process standards. More broadly, foreign administration/occupation sometimes moves into an ambitious process of social, legal and political transformation, as happened during the brief but remarkably active 12 month-period when the CPA was the government of Iraq. For issues like whether or not legislation introduced is discriminatory it is necessary to turn to international human rights law.[56]

In all cases of foreign occupation, moreover, there is the issue of *remedies*. It is notable here that the section of Baroness Symonds' statement dealing with official responses to allegations of abuse uses the language of practice not law, shifting things into the terrain of administrative discretion, not legal obligation, and as far as any remedy is concerned, the only thing that is mentioned is a criminal prosecution of the individuals responsible. What is missing, for example, is the possibility of some kind of civil remedy by victims of alleged abuse.[57]

Within the framework of international humanitarian law there is of course the work of the International Committee of the Red Cross (ICRC). This is cited by the United States in relation to the facilities in Guantánamo to suggest that there is third-party scrutiny in play.[58] The ICRC has repeatedly visited detainees in Guantánamo, Bagram, and Iraq,[59] but its role in this regard usually operates on the basis of confidentiality. As a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia reported in the *Simiç* case in connection with ICRC testimony before the Tribunal, the ICRC

> '… places particular emphasis on the importance of respecting the principles of … impartiality and neutrality, as well as the need for confidentiality in the performance of its functions … by adhering to these principles, it has been able to win the trust of warring parties to armed conflicts and bodies engaged in hostilities, in the absence of which it would not be able to perform the tasks assigned to it under international humanitarian law.'[60]

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[56] The provisions prohibiting discrimination in the main general human rights treaties are ICCPR (*supra* n. 4), Arts. 2(1) and 26; ECHR (*supra* n. 7), Art. 14; ACHR (*supra* n. 9), Arts. 1(1) and 24; CRC (*supra* n. 10), Art. 2.

[57] Treaty provisions setting out a general obligation to provide remedies for human rights abuses are cited *supra* n. 10.

[58] See, e.g., 'US Statement on the resolution sponsored by Cuba regarding 'Question of detainees in the area of the United States Naval Base in Guantanamo'', delivered by Mr. Lino Piedra, Public Member of the United States Delegation to the 61st Session of the UN Commission on Human Rights, 21 April 2005, available at <http://geneva.usmission.gov/humanrights/2005/0421guantanamo.htm> (last accessed 29 November 2006).

[59] For an overview of the activities of the ICRC in relation to detainees held by the United States in Bagram and Guantánamo see ICRC, 'US Detention Related to the Events of 11 September 2001 and Its Aftermath – The Role of the ICRC', 14 May 2004, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/73596F146DAB1A08C1256E9400469F48> (last accessed 28 August 2006) (hereinafter 'ICRC Statement, 14 May 2004').

[60] *Prosecutor* v. *Simic*, Case IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ICTY, Trial Chamber, 27 July 1999, obtainable from <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm>, para. 14.

On the duty of confidentiality, the Trial Chamber reported that

> '… an essential feature of that duty is that ICRC officials and employees do not testify about matters which come to their attention in the course of performing their functions. The ICRC position is based on its assessment that, if it were perceived that there was any likelihood or possibility that ICRC staff would testify, the warring parties would deny the ICRC access to their facilities.'[61]

As Jean-Pierre Lavoyer states, when ICRC representatives identify violations of humanitarian law

> '… the ICRC intervenes with the party concerned, explains the violation, and tries to obtain a change in its behavior. The ICRC does not act as a judge, but rather endeavors to initiate a constructive dialogue with the parties to a conflict. This is only possible if its interventions are kept discreet and confidential.'[62]

It follows, then, that as the ICRC has stated in the context of detainees held extraterritorially by the United States in the context of the so-called 'war on terror', '[t]he ICRC's lack of public comment on detention issues must … not be interpreted to mean that it has no concerns.'[63]

There are two circumstances where the confidentiality rule might not be complied with. In the first place, when the ICRC's confidential representations are leaked, the organization sometimes comments publicly on the substantive content of the leaked information. For example, when the report concerning detainees in Iraq extracted above was leaked and quoted in the *Wall Street Journal* in May 2004, Pierre Krähenbühl, the ICRC's Director of Operations, spoke to journalists to clarify certain factual details relating to the report and to confirm that, as stated in the report, some of the activities identified by the ICRC in Iraq, 'were tantamount to torture'.[64]

This situation is, of course, consistent with the confidentiality rule in that the ICRC is only speaking publicly to clarify details of a report that have already entered the public domain. It is notable that in the same press encounter the Director of Operations stated that in the light of the confidentiality rule the ICRC was 'unhappy' that the report had been made public.[65]

The second instance where the ICRC might make a public statement is outlined by M. Lavoyer thus:

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[61] Ibid.

[62] J.-P. Lavoyer, 'The International Committee of the Red Cross: How Does it Protect Victims of Armed Conflict ?', 9 *Pace International Law Review* (1997), pp. 287 at 289 (footnotes omitted).

[63] ICRC Statement, 14 May 2004, *supra* n. 59.

[64] P. Krähenbühl, 'Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners, Statement at Press Conference at International Committee of the Red Cross' Headquarters', 7 May 2004, obtainable from <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YRMYC?OpenDocument> (last visited 28 August 2006).

[65] Ibid.

> '[i]f serious violations of humanitarian law continue to occur even after the ICRC has made representations, the ICRC reserves the right to speak out and denounce such violations, though this must be in the interest of the victims themselves.'[66]

The ICRC has expressed concerns relating to the detainees in Guantánamo and Bagram in two areas: in the first place, it regrets that the detentions are not operating under a legal framework; in the second place, it has stated that its own

> '… observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantanamo have not yet been adequately addressed.'[67]

What is offered, then, is a statement of non-compliance in relation to detention and treatment but no detail of the factual occurrences giving rise to this and no explanation of how the law is being violated. As a process for subjecting detention and treatment to rigorous scrutiny involving detailed public disclosure of both factual circumstances and conformity to the law, it is necessarily limited. Moreover, it only operates when access to detainees is provided, yet in fact the ICRC has complained that this has not happened in the case of secret extraterritorial detention facilities. The ICRC has stated that it

> 'has ... repeatedly appealed to the American authorities for access to people detained in undisclosed locations.
>
> […]
>
> Beyond Bagram and Guantanamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority.'[68]

Although, then, it is wrong to say that without international human rights law there is a 'legal black hole' in the occupation context as far as safeguards on individual rights are concerned, the foregoing observations suggest that the applicable framework – local law and, where relevant, humanitarian law – is deficient for three principal reasons. In the first place, local law may not cover all relevant issues and in any case may be unenforceable due to privileges and immunities. In the second place, humanitarian law often fails to cover the full range of issues in play. In the third place, remedies are only partially effective, including, for example, because of a lack of transparency, as is usually the case with the ICRC, or because they only cover criminal prosecution and not also civil reparation.

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[66] Lavoyer, *supra* n. 62, p. 290 (footnotes omitted).
[67] ICRC Statement, 14 May 2004, *supra* n. 59.
[68] Ibid.

Each case of foreign administration/occupation is different, and the matrix of applicable obligations that might provide human rights protections vary, but in general terms it would seem that the legal vacuum policy concern, or, put differently, the objective of ensuring the existence of James Madison's 'auxiliary protections', is not fully addressed by local and humanitarian law. The problem is not that there would be no protections without human rights law; it is, rather, that the full range of protections that would apply to the same activity were it to be conducted by a state in its own territories are not in play. Here, then, is a linkage between the 'double standard' and 'legal vacuum' policy concerns.

2.5 Conclusion on the policy considerations in the case law

In concluding this consideration of the general policy issues highlighted by international jurisprudence, one can identify a suggestion that human rights law should apply to extraterritorial state action in order to prevent the following outcomes from occurring in consequence of the extraterritorial nature of the action:

(i) a double standard of legality operating as between the territorial and extraterritorial locus (*Lopez Burgos* and *Celiberti de Casariego*);
(ii) a disparity in human rights protection operating on grounds of nationality (*Coard* and General Comment 31);
(iii) a vacuum in rights protection being created through the act of preventing the existing sovereign from safeguarding rights (*Cyprus* v. *Turkey*).

The point is not that these three outcomes are necessarily unjustified in all circumstances (though they might be), but, rather, that they should not subsist merely because of the extraterritorial locus in which the acts take place. It is this situation which is avoided through the application of human rights obligations to extraterritorial state actions.

Whether considering the issue from a default position of non-applicability or applicability, bodies representing three leading international judicial or quasi judicial institutions monitoring the application of international legal instruments on civil and political rights – the Human Rights Committee, the Inter-American Commission, and the European Court and Commission of Human Rights – all conclude that as a matter of principle this area of international human rights law should apply extraterritorially.

3. Conclusion

The question of the applicability of international human rights norms to situations of foreign occupation/administration, thereby forming part of the *jus post bellum*, is as important as it is under-evaluated. It has not been possible in this piece to remedy the latter problem; what has been offered instead is an explanation of some of the key issues that need to be considered, and a sustained treatment of one of these

issues – whether human rights norms should apply at all in such contexts – as it has been addressed within the international jurisprudence.

Hopefully the foregoing analysis has conveyed a sense of how important this topic is and how many aspects of it, including fundamental aspects, are contested, unresolved, and worthy of further evaluation.

Chapter 10
PUTTING AN END TO HUMAN RIGHTS VIOLATIONS BY PROXY: ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS AND MEMBER STATES IN THE FRAMEWORK OF JUS POST BELLUM

Matteo Tondini*

Abstract
The accountability of international organizations for human rights violations is still a largely unresolved issue in contemporary legal theory and practice. It is relatively easy to establish that international organizations encounter responsibility for customary human rights law violations. However, at present the exercise of such responsibility is restricted by the scarce efficacy of the remedies available to third parties. Moreover, it is limited by immunities and the lack of jurisdiction of regional courts. This article argues that suing member states for acts of international organizations may represent an option to alleviate this dilemma in the context of the development of a jus post bellum. Since international organizations are among the principal actors in the peace-building, jus post bellum will also have to deal with acts of international institutions. Securing responsibility of international organizations and states operating under their political umbrella in post-conflict operations will prevent both of them acting as legibus soluti and will eventually clarify the applicable legal framework.

Introduction

Historically, the issue of accountability of international organizations for human rights violations has progressively arisen due to the broad powers and functions exercised by such institutions in crisis management and post-conflict reconstruction.[1] While international institutions are among the principal actors in the peace-

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[1] See, e.g., M.J. Aznar-Gómez, 'A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?', 13 *EJIL* (2002), pp. 223 at 233; K. Månsson, 'The Forgotten Agenda: Human Rights Protection and Promotion in Cold War Peacekeeping', 10 *Journal of Conflict & Security Law* (2005), pp. 379 at 384; S.R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', 16 *EJIL* (2005) p. 695; A.J. Bellamy and P.D. Williams, 'Who's Keeping the Peace? Regionalization and Contemporary Peace Operations', 29(4) *International Security* (2005) p. 157. Note that accountability problems arise as well when international organizations exercise powers and authorities *during* armed conflicts, i.e., in the context of military interventions abroad.

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building contexts, states often invoke the legal personality of international organizations in order to escape from legal scrutiny act. The current gaps arising in the accountability framework of the international legal order might be mitigated through member state accountability for acts of international organizations. The attribution of human rights violations by international organizations to member states would, in particular, provide a forum to litigate such claims before domestic or international courts.

Such a proposition raises, of course, a number of different legal questions. The issue of the extraterritorial application of human rights treaty norms[2] blends in this context with the jurisdiction of the main human rights supervisory or judicial bodies over member states. The scarce efficacy of the internal compensation mechanisms of international organizations must be considered, if one explores 'alternative avenues of redress'. Moreover, the call for accountability in post-conflict situations coincides with a broader systemic challenge which is at the heart of *jus post bellum*,[3] namely a 'normative gap' in the law governing peace-making after conflict.

Normative acts of international organizations do not only have significant impact on third parties subjected to their authority, but may also affect the regulatory framework of peace operations. This finding has several implications. It raises the issue of accountability to third parties. Secondly, there are issues concerning the categorization of the existing framework of international law. Securing the accountability of all international legal persons concerned (states and international organizations) may require the establishment of a more comprehensive basic legal framework concerning post-conflict operations (i.e., including powers and obligations of international actors, reciprocally and towards third parties).

A further issue in this debate is the application of human rights law provisions in circumstances following intervention. The issue of accountability in the

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[2] For the purpose of this contribution, the extraterritorial application of human rights law is considered as being firmly grounded in international law. See generally on the matter F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia 2004); T. Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL* (1995) p. 78; R. Wilde, 'The "legal space" or "espace juridique" of the European Convention on Human Rights: Is it relevant to extraterritorial state action?', 10 *EHRLR* (2005), p. 115; Id., 'Casting Light on the "Legal Black Hole": Some Political Issues at Stake', 11 *EHRLR* (2006) p. 552; Id., 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Michigan Journal of International Law* (2005) p. 739; S. Borelli, 'Casting light on the legal black hole: International law and detentions abroad in the "war on terror"', 87 *IRRC* (2005), p. 39; M. Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *NILR* (2005), p. 349; M.J. Dennis, Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, 99 *AJIL* (2005), p. 119; T. Schilling, 'Is the United States bound by the ICCPR in relation to occupied territories?', *Emile Noel Fellows Forum* (Fall 2004), <www.jeanmonnetprogram.org>.

[3] For a broad analysis and conceptualization of *jus post bellum* see C. Stahn, '*Jus ad bellum*, *jus in bello … jus post bellum*?: Rethinking the Conception of the Law of Armed Force', 17 *EJIL* (2006) p. 921. For previous contributions see R.P. DiMeglio, 'The Evolution of the Just War Tradition: Defining Jus Post Bellum', 186 *Military Law Review* (2005), p. 116; K. Boon, 'Legislative Reform in Post – Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law – Making Powers', 50 *McGill Law Journal* (2005), p. 285.

implementation of UN peace operations may be a useful point of reference, in particular given the quasi-state powers held by the UN during interim administrations of territories. The questions raised during the analysis may be extended to any other international institution with international legal personality, dealing with the same type of tasks.

The article seeks to explore the main problems surrounding the issue of accountability of international organizations to third parties, especially during peace operations or generally in the aftermath of a military intervention. For this purpose, only a justiciable concept of accountability is taken into account and therefore the study focuses on the possibility of suing member states before domestic or international courts. In this respect, the analysis is limited to the European Court of Human Rights (ECtHR) recent case law, but the same conclusions may again be extended to other regional courts or supervisory bodies.

This chapter examines three main topics. Section 1 analyses the concept of accountability and immunity of international organizations. Section 2 addresses the potential co–responsibility for human rights violations between the UN and member states participating in peace operations. Section 3 illustrates some relevant ECtHR case law on the matter.

1. The Principle of Accountability of International Organizations

The notion of 'accountability' poses in itself a legal dilemma.[4] According to Gerhard Hafner, it

> 'is a legal expression of neither the common law nor any other legal system ... The absence of equivalent expressions is the best proof of the absence of an established meaning of accountability as a term of law.'[5]

However, a credible and justiciable concept of accountability must be linked to a set of legal, moral or even political standards by which an agent can be judged. As a consequence, 'when responsibility is used in this sense of accountability, then it entails the notion that some consequence could have been avoided.'[6] Once the agent's conduct is analyzed as a legal paradigm, the subsequent question of exercise of the responsibility emerges. In this respect, notwithstanding that international institutions vested with international legal personality are deemed as subjects of international law, their potential 'accountability' is considered to extend beyond the mere principles of responsibility and liability for international wrongful acts.

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[4] For an in depth analysis of the issue see M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden/Boston, Martinus Nijhoff Publishers 2005) p. 61.

[5] G. Hafner, 'Accountability of International Organizations', 97 *ASIL Proceedings* (2003), p. 236.

[6] D. Kroslak, 'The Responsibility of Collective External Bystanders in Cases of Genocide: The French in Rwanda', in T. Erskine (ed.), *Can Institutions Have Responsibilities?: Collective Moral Agency and International Relations* (New York, Palgrave Macmillan, 2003) pp. 159 at 162.

Such responsibility cannot rely entirely on the traditional principle of territorial sovereignty, even though the latter still governs situations in which an international institution acts as an administering authority over a territory and its population (e.g., the UN Administrations in Timor Leste or Kosovo)[7] or when the same organization holds the territorial jurisdiction over its headquarters and their premises located in a host country.[8] In these cases, strengthening and defining clear accountability rules could represent a prerequisite for the final establishment of state institutions (respectful of the rule of law) at the end of the *post bellum* transitional phase.

Such a broad notion of responsibility is based on the idea that any kind of authority should be subject to some form of accountability in the exercise of public power.[9] Third parties are increasingly affected by acts undertaken by international organizations. This means that the corresponding accountability regime have to be extended to concerned individuals or groups, external to the organization.[10] On the international plane, as it has been noted by the International Law Commission (ILC),

> '[a]n international obligation may be owed by an international organisation to the international community as a whole, one or several States, whether members or non – members, another international organization or other international organizations and any other subject of international law.'[11]

When examining the responsibility of international organizations at the domestic and international level, scholars tend to distinguish three different categories: (i) internal accountability; (ii) liability for unlawful acts; and (iii) legal responsibility for breach of international obligations.[12] Only the last type of responsibility is examined by the ILC in its Draft Articles on the Responsibility of International Organisations.[13] It is also the most suitable form of responsibility in the context of the issues dealt with in the context of this contribution.

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[7] *Ex plurimis*, R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001), p. 583; C. Stahn, 'International Territorial Administration in the former Yugoslavia: Origins, Development, and Challenges Ahead', 61 *ZaöRV* (2001), pp. 107 at 137; B. Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open – Ended Mandate', 16 *EJIL* (2005), p. 637.

[8] E. Suzuki and S. Nanwani, 'Responsibility of International Organizations: The Accountability Mechanism of Multilateral Developments Banks', 27 *Michigan Journal of International Law* (2005), pp. 177 at 193; P.C. Szasz, 'The United Nations Legislates to Limit Its Liability', 81 *AJIL* (1987), pp. 739 at 740.

[9] M.N. Shaw, *International Law* 5th edn. (Cambridge, Cambridge University Press 2003) p. 1204.

[10] S. Burall and C. Neligan, *The Accountability of International Organizations* (Berlin, GPPi Research Paper Series No. 2 2005) p. 7.

[11] Report of the International Law Commission, UN Doc. A/60/10 (2005), Commentary of Draft Article 8, at 87. Hereafter, ILC Draft articles on responsibility of international organizations will be reported as 'ILC Draft Art.', followed by number of article.

[12] ILA, 'Accountability of International Organisations: Final Report of the Berlin Conference (2004)', 1 *International Organizations Law Review* (2004) pp. 221 at 226. See also on the point V.P. Nanda, 'Accountability of International Organizations: Some Observations', 33 *Denver Journal of International Law and Policy* (2005), pp. 379 at 387.

[13] ILC Draft Art. 1, in ILC (2005), *supra* n. 11, at 79. For the commentary to the article see the 2003 ILC Report (Report of the International Law Commission, UN Doc. A/58/10 (2003), at 37).

As a general rule, any breach of international law by international institutions gives rise to international responsibility. The principle 'that international organisations may be held internationally responsible for their acts is nowadays part of customary international law.'[14] According to the ILC, such a wrongful act may consist in 'a breach of an international obligation'[15] of the international organization concerned. This provision resembles the corresponding norm drafted by the Commission in the field of state responsibility.[16] A violation of international law requires that the respective act or omission is incompatible with a pre-existing obligation, 'regardless of its origin and character'.[17] This implies that international organizations may be subject to obligations, even though are normally not parties to human rights instruments, and thus are not bound by human rights obligations as a matter of treaty law.[18] International organizations are exempted from human rights obligations deriving from customary law or peremptory norms (*jus cogens*).[19] Consequently, activities carried out in violation of customary human rights law may be found to be illicit or represent an excess or abuse of power, even though such action has been authorized by the governing bodies of international institutions (e.g., the UN Security Council, the WHO – World Health Assembly, the ICAO Council, etc.).[20]

Some legal scholars are inclined to accept that customary norms bind international organizations insofar as they are in a position to practically comply with them,[21] thus excluding responsibility in cases where the respective institutions lack the means or the authority to prevent them. Practice shows that responsibility is not excluded as long as international organizations own the required financial resources to settle potential claims by third parties,[22] although they may prefer to negotiate settlements with other subjects of international law or through their local claims offices rather than dealing with applications filed before judicial bodies.[23] These

[14] ILA, *supra* n. 12, at 254.

[15] ILC Draft Art. 3.

[16] See ILC (2003), *supra* n. 13, at 45-46.

[17] ILC Draft Art. 8-9, in ILC (2005), *supra* n. 11, at 82 and 87.

[18] *Confédération française démocratique du travail (CFDT)* v. *Council of the European Communities*, Decision of 10 July 1978, 13 *Decisions & Reports* (1978) 231; *H.v.d.P.* v. *the Netherlands*, Decision of 8 April 1987, UN Doc. A/42/40 Supp. No. 40 (1987), para. 3.2.

[19] See ILA, *supra* n. 12, at 250; P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn. (London, Sweet & Maxwell 2001) p. 45; A. Orakhelashvili, 'The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions', 16 *EJIL* (2005), pp. 59 at 60.

[20] See Suzuki and Nanwani, *supra* n. 8, at p. 195.

[21] A. Reinisch, 'Securing the Accountability of International Organizations', 7(2) *Global Governance* (2001), pp. 131 at 135.

[22] Nevertheless, international organizations may eventually decide to unilaterally limit their own financial liability to third parties. For instance, in 1998 the UN General Assembly (endorsing a proposal of the Secretary-General) approved temporal and financial limitations on the liability of the Organization (UNGA, Third – party liability: temporal and financial limitations, UN Doc. A/RES/52/247 (1998)).

[23] See the praise paid by the UN Secretary-General in his report on the financing of peacekeeping operations to the so called 'lump-sum' agreements, by which the Organization negotiates a settlement coming from a natural person, directly with the government acting on behalf of him/her (Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia,

situations, in which international organizations are liable to third parties, must be distinguished from disputes regarding alleged torts of the same organizations towards their staff members. In such cases, disputes are often settled by internal administrative bodies established to resolve potential controversies, such as UN Administrative Tribunals.[24]

The accountability of international organizations is further affected by their immunity from international and domestic courts. Provisions regarding immunity from domestic courts are typically included in any relevant applicable agreement between the organization, the host state and the state contributing troops, such as the Status of Forces/Mission Agreements (SOFA/SOMA) or participation agreements and memorandums of understanding (MoU).[25] Immunity has been considered essential in order to guarantee the independence and effective functioning of the international organizations, as reported by the International Court of Justice in the *Reparations for Injuries* case.[26] This protection is based on the conception that international organizations normally do not perform direct administering activities, 'but rather, perform activities that are distinct and somehow "above"' the domestic sphere.[27]

There is some ground to argue that the independence and functioning of international organizations would not be threatened by further-reaching immunity restrictions or the commitment of such organizations to submit themselves to judicial scrutiny with respect to claims by third parties.[28] However, where international organizations enjoy immunity from member or host states domestic courts, they usually establish internal private claims settlement bodies, which represent the only

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the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters, Report of the Secretary General, UN Doc. A/51/389 (1996), para. 34, reprinted in 37 *ILM* (1998) p. 707.

[24] E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', 51 *ICLQ* (2002), pp. 1 at 11. For the purposes of this essay, where not otherwise specified, responsibility refers to third parties.

[25] See Report of the Secretary-General, *supra* n. 22, para. 18, at 705. This is also the position of the Democratic Republic of Congo on the issue, submitted to the ILC in 2005 (Responsibility of International Organizations: Comments and Observations Received from Governments and International Organizations, UN Doc. A/CN.4/556 (2005), at 29). See also UN Model Status – of the Force Agreement for Peacekeeping Operations, UN Doc. A/45/594 (1990), para. 6; Report of the Secretary-General on the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace – Keeping Operations, UN Doc. A/46/185 (1991), Annex, para. 28; Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation], UN Doc. A/51/967 (1997), Annex.

[26] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, (1949) *ICJ Rep.* 174, at 183.

[27] R. Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor', 7 *ILSA Journal of International & Comparative Law* (2001), pp. 455 at 458.

[28] See Gaillard and Pingel-Lenuzza, *supra* n. 24, at p. 15. See also Judge Loucaides' dissenting opinion in the ECtHR *McElhinney* case: 'Therefore, one should be reluctant to accept restrictions on Convention rights derived from principles of international law such as those establishing immunities which are not even part of the *jus cogens* norms' (*McElhinney* v. *Ireland*, Decision of 21 November 2001, 34 *EHRR* (2002) 13, at 341).

jurisdiction before which third parties may file applications for compensation.[29] This conception deserves some re-consideration. One may argue that the respective procedures, as well as the guarantees granted to applicants, should be equivalent to the domestic procedural standards of member states courts.[30] Corresponding obligations may be derived from the duty of states parties to effectively secure the right to a fair trial (and the right to an effective remedy) as enshrined in relevant international human rights instruments.[31] Alternatively, it could be argued that the host state is under an obligation to grant effective remedies to individuals within its jurisdiction.[32]

The current immunity system at the international and domestic level is based on a distinction between the concepts of judicial liability and compensation for damages[33] – which in practice is granted only if the organization itself acknowledges its liability. In 2004, the International Law Association (ILA) made a proposal to mitigate this derogation from the principle of judicial impartiality/independence (which in turn might lead to a *de facto* lack of responsibility). It recommended that such claims be referred 'to arbitration or establish a standing claims commission or ad hoc mixed claims commissions to deal with them.'[34]

Some reform may, in particular, be necessary in the context of the UN. In theory, the UN should grant appropriate models of settlement with regard to any kind of disputes.[35] Current practice, however, shows a different reality. The stand-

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[29] See on the point *Waite and Kennedy* v. *Germany* and *Beer and Regan* v. *Germany*, Decision of 18 February 1999, 30 *EHRR* (2000) 261, at 285, para. 59; *Fogarty* v. *United Kingdom*, Decision of 21 November 2001, 34 *EHRR* (2002) 12, at 314, para. 36.

[30] B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law', 68 (3-4) *Law and Contemporary Problems* (2005), pp. 15 at 40. See also *Bellet* v. *France*, Decision of 4 December 1995, (1995) *ECHR* 53, at para. 36: 'The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights'.

[31] See ICCPR, Art. 14; ECHR, Art. 6 and 13; ACHR, Art. 8. See also *Golder* v. *United Kingdom*, Decision of 21 February 1975, 1 *EHRR* (1979-1980) 524, at 535, para. 34: 'In civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'; *Dyer* v. *United Kingdom*, Decision of 9 October 1984, 39 *Decisions & Reports* (1984) 246, at 252: 'Were Article 6(1) to be interpreted as enabling a State party to remove the jurisdiction of the courts to determine certain classes of civil claims or to confer immunities from liability on certain groups in respect of their actions, without any possibility of control by the Convention organs, there would exist no protection against the danger of arbitrary power'.

[32] M. Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virginia Journal of International Law* (1995), pp. 53 at 90; L. Cameron, *Accountability of International Organisations Engaged in the Administration of Territory* (Geneva, University Centre for International Humanitarian Law 2006) p. 85 <www.ucihl.org/teaching/Henry_Duannt_2006b_LCameron.pdf>.

[33] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*Cumaraswamy* Case), Advisory Opinion, 29 April 1999, (1999) *ICJ Rep.* 62, at 88, para. 66.

[34] See ILA, *supra* n. 12, at 274.

[35] Convention on the Privileges and Immunities of the United Nations, (1946) 1 *UNTS* 15, Sec. 29.

ing claims commissions, which is contemplated in the UN Model SOFA,[36] has never been established. Third party claims of private law type have been mostly settled without resort to their establishment.[37] Proceedings are typically held before a 'local claims review board', which is basically a UN administrative body operating in the host country, reporting to the UN Secretary-General.[38] These boards have not been very effective in dealing with human rights violations committed by UN officials, as is evidenced by the number of alleged sexual abuses, including those in the Democratic Republic of the Congo and Sudan.[39] According to some media sources, a number of complaints have been filed by victims in Sudan regarding abuses committed by international officers. The relevant information suggests that some of the claims have not been tracked down and there was no attempt by the UN or local officials to interview the claimants, although an internal report compiled by UNICEF in July 2005 had revealed details about the problem and specified that the first indications of sexual exploitations had emerged within months of the UN force's arrival.[40]

This type of immunity clashes with the rationale of a *jus post bellum*. It excludes the most relevant actors from the legal order governing peace operations by granting them quasi-extraterritorial status.

2. Accountability of United Nations and Member States Participating in Peace Operations

In order to address the issue of accountability of international organizations, it seems unavoidable to examine the status of the UN *vis-à-vis* third parties during peace operations.[41] As a global actor, the UN is involved in a multitude of activities which indeed may imply infringements of human rights or other individual rights, especially where the Organization exercises direct control over individuals or areas, as in the case of UN interim/transitional territorial administrations. The UN may thus be considered as one of the prime sources of law and main actor of a *just post bellum*. In fact,

> '[t]he UN's role in the creation of human rights law, the recognition of these obligations as forming international standards, and the regular application of these

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[36] See UN SOFA, *supra* n. 25, para. 51.

[37] See the Report of the Secretary-General, *supra* n. 22, para. 22 at 705.

[38] K. Schmalenbach, 'Third Party Liability of International Organisation', in H. Langholtz, B. Kondoch and A. Wells (eds.), 10 *International Peacekeeping: The Yearbook of International Peace Operations* (2006), pp. 33 at 41.

[39] K. Holt and S. Hughes, 'UN staff accused of raping children in Sudan' in *Daily Telegraph*, 3 January 2007 <www.telegraph.co.uk>.

[40] M. Pflanz, 'UN to hold inquiry into Sudan child abuse', *Daily Telegraph*, 4 January 2007 <http://www.telegraph.co.uk>.

[41] We have already examined the issue in M. Tondini, 'UN Peace Operations: The Last Frontier of the Extraterritorial Application of Human Rights', 44 (1-2) *Revue de droit militaire et de droit de la guerre* (2005), pp. 175 at 191.

> standards provide strong support for the use of international human rights standards as the basis for UN obligations in interim administrations.'[42]

However, international authorities have often refused to be bound by human rights law conventions in the course of such operations. This principle was made clear by UNMIK in its first report to the Human Rights Committee in March 2006:

> 'These [human rights] treaties and conventions are in any way binding on UNMIK. It must be remembered throughout that the situation of Kosovo under interim administration by UNMIK is *sui generis*. Accordingly, it has been the consistent position of UNMIK that treaties and agreements, to which the State Union of Serbia and Montenegro is a party, are not automatically binding on UNMIK.'[43]

Notwithstanding this position, the Council of Europe (CoE) Commissioner of Human Rights reaffirmed that the legal and political responsibility for abidance by human rights standards in the course of UN territorial administrations lies with the Special Representative of the Secretary-General (SRSG), being the chief of the administration.[44] It may also be argued that acts of international organizations carried out in the exercise of governmental powers (as, for instance, in the context of complex peace-building operations) may constitute acts of a dual nature (concept of 'functional duality'). They might be international in nature, to the extent that they form part of the international organization's legal order, and domestic in character, in so far as they are part of the host country's internal legal system.[45] Following this logic, the UN may be bound by human rights law as embodied in the host nation's constitutional system and, *a fortiori*, could be held responsible for violations of human rights before domestic courts[46] while performing domestic civil

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[42] A. Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo', 52 *American University Law Review* (2003), pp. 1291 at 1321.

[43] Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo Since June 1999, UN Doc. CCPR/C/UNK/1 (2006), paras. 123-4, at 28.

[44] CoE, Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, 16 October 2002, Doc. No. CommDH(2002)11, Sec. V 1(2).

[45] On the concept of 'functional duality' see generally R. Wilde, 'The accountability of international organizations and the concept of "functional duality"' in W.P. Heere (ed.), *From Government to Governance. The Growing Impact of Non State Actors on the International and European Legal System* (The Hague, T.M.C. Asser Press 2004) p. 164; G. Verdirame, 'Compliance with Human Rights in UN Operations', 2 *Human Rights Law Review* (2002), pp. 265 at 282-283; C. Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yearbook of United Nations Law* (2001), pp. 105 at 145-148; B. Knoll, 'Beyond the *Mission Civilisatrice*: The Properties of a Normative Order within an Internationalized Territory', 19 *LJIL* (2006), pp. 275 at 295-300.

[46] In order to illustrate the concept, scholars usually refer to the Constitutional Court of BiH decision in the *State Border Service* case (*Request for Evaluation of Constitutionality of the Law on State Border Service*, Decision of 3 November 2000, 61 *ZaöRV* (2001), p. 173). The Court, in addressing the issue of the legal nature of the High Representative for BiH's regulations, held that such norms are in principle susceptible to the constitutional review as acts of BiH local institutions (paras. 5, 6 and 9).

functions (at least when this is not precluded by other means[47]). This reasoning appears to be consistent with the leading principles on responsibility of states and international organizations included in the *travaux* of ILC.[48]

Some authoritative scholars argue that there is still no firm authority to establish that the UN bears an exclusive or primary responsibility for the torts caused by UN officials.[49] However, the UN has accepted responsibility for damages caused by its agents or troops under its direct command and control during peace operations.[50] In these circumstances, accountability for human rights violations may flow from the UN's policy of 'integrating' human rights into the organizational framework of peace operations[51] (although the Organization might hardly be considered civilly liable for breach of treaty law obligations, since it is not a party to any covenant or convention on the matter[52]).

2.1 Violations committed by military contingents and concurrent responsibility of sending states

In order to establish UN responsibility in the context of military contingents acting under UN auspices, it is necessary to show a previous hierarchical subordination between the UN and the official who materially commits the violation.[53] It is generally argued that the Organization must exercise the full 'operational command' (as opposed to mere 'operational control'), in order to exclude potential concurrent or primary responsibility of their sending states.[54] 'Command' may be defined as

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[47] See, e.g., the case of Kosovo, where 'UNMIK is ... the final arbiter of the lawfulness of its own legislation' (Stahn, *supra* n. 7, at p. 164).

[48] See in particular Draft Art. 5 on the Responsibility of States for Internationally Wrongful Acts (UN Doc. A/RES/56/83, Annex): 'The conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.' Although the Commentary of Art. 5 is extremely vague on the meaning of the term 'entity', as it 'raises difficult questions of the relations between States and international organizations', it seems not to exclude the possibility that the word concerned may also indicate an international organization's organ (Ibid., para. 77, at 98). The earlier work of the Commission on the topic seems to confirm the initial will of the drafters to include this principle among the draft articles on state responsibility: see the original text of Draft Art. 6, as drafted in 1974, and the commentary thereto, quoted in the First Report on Responsibility of International Organizations, submitted by the Special Rapporteur to the Commission in 2003 (UN Doc. A/CN.4/532, at 3-4).

[49] This is the opinion of Prof. Ian Brownlie, quoted in Suzuki and Nanwani, *supra* n. 8, at p. 194.

[50] See Report of the Secretary-General, *supra* n. 22, paras. 6-7, at 702.

[51] K. Månsson, 'Integration of Human Rights in Peace Operations: Is There an Ideal Model?', 13 *International Peacekeeping* (2006), pp. 547 at 549.

[52] A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001), pp. 851 at 854.

[53] See the response submitted by Mexico to the ILC with regard to the attribution of the conduct of a UN peacekeeping force to the Organization in Responsibility of International Organizations: Comments and Observations Received from Governments, UN Doc. A/CN.4/547 (2004), at 9.

[54] See Schmalenbach, *supra* n. 38, at p. 36; Report of the Secretary-General, *supra* n. 22, para. 17, at 704; P. Tavernier, *Les Casques bleus* (Paris, Presses Universitaires de France 1996), p. 98; D. Shraga, 'The United Nations as an actor bound by international humanitarian law', in L. Condorelli, A.M. La

'the authority to issue orders covering every aspect of military operations and administration', while the 'operational control' results in

> 'the authority to assign tasks to [national] forces [or] units led by [national] officers … Within the limits of operational control, a foreign UN commander cannot: change the mission or deploy [national] forces outside the area of responsibility, … separate units, divide their supplies, administer discipline, promote anyone, or change their internal organization.'[55]

In cases in which the UN retains both the command and control of its military forces, any violation of international humanitarian law (IHL) or human rights law committed by UN troops in their official capacity may be attributed to the UN itself.[56] On the contrary, in the case of a coalition of states acting under the UN auspices, where the contributing nations maintain the command of their forces, the military contingents deployed do not assume the status of a subsidiary organ of the Organization.[57] Therefore, the 'control' requisite remains central in determining the level of primary or concurrent responsibility,[58] even if the possibility for the UN to hold both command and control of national military forces is remote,[59] because '[i]t is absolutely clear that in practice the majority of contingents reserve the right to consult their own capital, particularly in difficult operations, such as those in Somalia and Rwanda.'[60] As regards the UN missions in Somalia (UNOSOM I/II), it should be noted that both the Human Rights Committee (HRC) and the Committee against Torture avoided considering a potential UN co-responsibility in the allegations of mistreatments and torture moved against national contingents,[61] even

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Rosa e S. Scherrer (eds.), *Les Nations Unies et le droit international humanitaire: Actes du Colloque international à l'occasion du cinquantième anniversaire des Nations Unies, Genève, 19, 20 et 21 octobre 1995* (Paris, Editions Pedone 1996) pp. 317 at 327.

[55] See US PDD 25 of 3 May 1994, quoted in 'United States: Administration Policy on Reforming Multilateral Peace Operations', 33 *ILM* (1994), p. 808. The same definitions of command and control are reported in the UN Civilian Police Handbook, UN Doc. UN/223/TH/CIPO95 (1995), at 12.

[56] As it was stated by Poland before the ILC: 'the responsibility of an international organization should be restricted to cases in which peacekeeping forces act on the basis of a specific resolution of the organization, and under the command of the organization. However, the responsibility of member States cannot be absolutely excluded if the armed forces are acting on behalf of the sending States and/or are directly controlled by officers (commanders) from the respective States' (See UN Doc. A/CN.4/547 (2004), *supra* n. 53, at 9).

[57] J.L. Grenier, 'Extraterritorial applicability of human rights treaty obligations to United Nations – mandated forces', in A. Faite, J. and L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (Geneva, ICRC 2004) pp. 79 at 80.

[58] R. Murphy, 'International Humanitarian Law and Peace Support Operations: Bridging the Gap', 23 *Journal of Conflict Studies* (2003), pp. 12 at 20.

[59] Ibid., at p. 41.

[60] Commission on Human Rights, Working paper on the accountability of international personnel taking part in peace support operations submitted by Françoise Hampson, UN Doc. E/CN.4/Sub.2/2005/42 (2005), at 7. Prof. Hampson submitted her first working paper to the Commission on 13 August 2001 (UN Doc. E/CN.4/Sub.2/2001/WP.1).

[61] F. Hoffmann and F. Mégret, 'Fostering Human Rights Accountability: An Ombudsperson for the United Nations?', 11(1) *Global Governance* (2005), pp. 43 at 53.

if this was probably due solely to the sensitivity of the issue. However, the domestic courts of participating countries, exercising their jurisdiction over such cases, indirectly supported the logic of national responsibility for acts performed by national forces under the UN control.[62] Hence, generally, it may be affirmed that 'missions are so comparatively ephemeral that the lines of political command and control cannot be formalized and regularized before the mission's ending.'[63]

In addition, this confusion in the chain of command may generate possible conflicting divisions of responsibility between the UN and sending states for any kind of violations.[64] As a consequence, the possibility of a concurrent responsibility of contributing states for any kind of torts is higher, although the effective level of accountability of sending states should be tied to their concrete fields of operation and to the effective level of control exercised on their troops.[65] Besides, as it has been recognized by the ILC, the

> 'attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization.'[66]

The same consequences arise where a UN military contingent, formally under the UN command and control, continues to observe orders issued directly from its government, which, therefore, might be called to respond to any violations taking place, including human rights violations.[67] Following this logic, the rationale of 'effective control' provided the basis of the allegations by Serbia and Montenegro against several NATO countries in the case concerning the *Legality of Use of Force*.[68] Serbia and Montenegro argued that the process of targeting as well as the choice of targets to be hit by NATO air strikes during the Kosovo war was previously and

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[62] For a brief list of cases see Tondini, *supra* n. 41, at p. 203.

[63] D.S. Gordon, 'Icarus Rising and Falling: The Evolution of UN Command and Control Structures', in D.S. Gordon and F.H. Toase (eds.), *Aspects of Peacekeeping* (London/Portland, Frank Cass 2001) pp. 19 at 21. The author refers to UNPROFOR and UNOSOM I/II.

[64] B.D. Tittemore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford Journal of International Law* (1997), pp. 61 at 85.

[65] J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001), pp. 469 at 480. *Mutatis mutandis*, this is the position held by the applicants in the *Banković* case, regarding a 'gradual approach' to the notion of jurisdiction, i.e., proportionate to the extension of the control exercised (R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M.T. Kamminga (eds.), *supra* n. 2, pp. 83 at 120).

[66] Report of the International Law Commission, UN Doc. A/59/10 (2004), at 101.

[67] D. Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations* (New York, Jean Monnet Working Paper No. 4/03, New York University School of Law 2003) p. 59.

[68] *Serbia and Montenegro* v. *Portugal, United Kingdom, Netherlands, Italy, Germany, Canada, France, Belgium, Preliminary Objections* (*Case Concerning the Legality of the Use of Force*), Decision of 15 December 2004, 44 *ILM* (2005), p. 299. See also the commentary to the case by Christine Gray in 54 *ICLQ* (2005), p. 787. More remarks in Zwanenburg, *supra* n. 4, at p. 116.

individually agreed on among the countries whose forces participated in the actions, and thus this gave rise to their concurrent individual responsibility.[69] Given the lack of standing of international organizations (e.g., NATO before the ICJ),[70] the plaintiff argued that it had no option other than suing member states individually before the Court.[71] In replying to the allegations advanced by Serbia and Montenegro, the defendants contended that they could only rely on the eventual collective responsibility of the whole NATO for the air strikes,[72] in order to avert individual state responsibility, which would probably have been confirmed if the Court had pronounced on the merits.

The UN itself has acknowledged concurrent responsibility of states contributing personnel in peacekeeping operations, if the cause of tort was due to 'gross negligence or willful misconduct of the personnel provided' by the governments concerned.[73] In this case, the UN retains the possibility of seeking a recovery from the countries participating in the operations.[74] It seems only logical to argue third parties should be allowed to bring claims concerning alleged breaches of human rights against member states, if the Organization itself recognizes the single sending states' responsibility for acts performed by UN troops. The possibility of civil claims against the sending states before their own domestic courts has been recently highlighted before the UN Commission on Human Rights.[75]

2.2 Human rights violations made by police or civilian personnel

The same principles regarding concurrent responsibility between the UN and sending states for activities carried out by military forces may be applied to UN police and civilian staff members. As a general rule, civilian staff recruited directly by an international organization act in the capacity as agents of that organization,[76] thus potentially engaging the sole responsibility of the organization concerned.[77] The UN status of members of a Civilian Police (CIVPOL) does not differ from that of

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[69] Statement by Mr. Vladimir Djerić on behalf of Serbia and Montenegro before the ICJ, 23 April 2004, Verbatim record, at 31–2 <www.icj-cij.org/cijwww/cdocket/cyall/cyall_cr/cyall_cyall_ccr200423_20040423.pdf>.

[70] It is also well-known that the ICJ merely retains the power to issue advisory opinions dealing with the rights and obligations of international organizations and only at the request of the same organizations concerned. See the Statute of the International Court of Justice, Art. 34, 68, 59.

[71] K. Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in Closing The Gap', 25 *Michigan Journal of International Law* (2004), pp. 1159 at 1166.

[72] *Yugoslavia* v. *Canada*, Request for the indication of provisional measures, Decision of 12 May 1999, CR 99/27, Verbatim record <www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_iyca_icr9927_19990512.html>: 'Joint and several liability for acts of an international organization, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides for such liability'.

[73] See UN Model MoU, *supra* n. 25, Art. 9.

[74] See Report of the Secretary-General, *supra* n. 22, para. 42, at 709.

[75] See Working paper on the accountability of international personnel, *supra* n. 60, at 13.

[76] Ibid., at 8; Cameron, *supra* n. 32, at p. 74.

[77] Ibid., at p. 77.

other civilian personnel, being that of 'experts on mission' according to Article IV of the Convention on the Privileges and Immunities of the United Nations.[78] Therefore, as provided by the 1994 UN Safety Convention, international police officers should be considered as being totally included among the UN personnel.[79]

However, the practice of peace operations reveals a different reality. Civilian staff personnel is often 'associated'[80] or simply 'seconded'[81] to the organization, which means that the latter engages national civil servants temporarily detached from their regular posts. In order to avoid unexpected problems and reduce margins of responsibility, the organization, member states and officials concerned usually sign a prior tripartite agreement, which should entirely regulate the issue of potential responsibilities among the players involved in the operation.[82] However, in these cases, effective responsibility for the activity of associated or seconded personnel is to be attributed to the organization and the contributing states on the basis of the substantial control exercised.[83] Hence, even a mere *de facto* control, carried out by sending countries, could establish the case for a concurrent responsibility of both the state and the organization.

For instance, some international organizations, like the OSCE, employ personnel primarily by secondment. The OSCE has admitted that '(t)he Organisation has little control over who is recruited … and the quality of control is less effective than for contracted personnel.' According to the OSCE, secondment is also 'a factor that contributes to diminish effectiveness and credibility of the Organisation.'[84] It may be noted that on this sole legal basis, a concurrent responsibility for sending states seems more than likely.

The same reasoning may be extended to CIVPOL personnel. The International Police Units deployed until 2002 under the auspices of the UN Mission in Bosnia and Herzegovina (UNMIBH)[85] marks a good example. According to Annex 11 of the Dayton Agreement, the police force enjoys the status of a UN body.[86]

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[78] UN Model SOFA, *supra* n. 25, para. 26. Human rights violations by CIVPOL officers are reported to have taken place in Cambodia, Salvador, Haiti, Bosnia and Kosovo. Some cases of misbehavior are reported in Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa, UN Doc. A/57/465 (2002), Annex.

[79] Convention on the Safety of United Nations and Associated Personnel, UNGA Res. 49/59, 49 UN GAOR Supp. (No. 49) at 299, UN Doc. A/49/49 (1994), Art. 1(a)(ii).

[80] '"[A]ssociated personnel" means: persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations' (ibid., Art. 1(b)(i)).

[81] See Hafner, *supra* n. 5, at p. 239.

[82] As for the UN see UNGA, Personnel questions, UN Doc. A/RES/47/226 (1993).

[83] ILC Draft Art. 5.

[84] OSCE Parliamentary Assembly and Swiss Institute for World Affairs, *Colloquium on "The Future of the OSCE"*, Washington, 5-6 June 2005, at 11 <www.oscepa.org/admin/getbinary.asp?FileID=1050>.

[85] The 'International Police Task Force' (IPTF) was established by the UN SC Res. No. 1035 (1995), following the *Dayton Agreement* (General Framework Agreement for Peace in Bosnia and Herzegovina, UN Doc. S/1995/999 (1995), Annex).

[86] See also O. Simic, *Accountability of UN civilian police involved in Trafficking of Women in Bosnia and Herzegovina*, Peace & Conflict Monitor Special Report, 16 November 2004, at 4 <www.monitor.upeace.org/archive.cfm?id_article=219>.

This finding suggests that the responsibility for acts performed on duty resides exclusively with the UN. This conclusion is supported by the 'CIVPOL Concept' which is common to all the UN police missions. This concept relies on the existence of an independent chain of command with exclusive reporting duties to the Head of mission (CIVPOL Commissioner).[87] Sometimes, such a chain of command is separate and autonomous from the civilian pillar and the police commander reports directly to the chief of the UN mission (Mozambique).[88] In other instances, the CIVPOL Commissioner may be responsible for the managerial and operational control of the whole international police force (as in the case of the Transitional Administration in East Slavonia).[89]

However, a closer analysis reveals that national police contingents participating in the mission often maintain strong links with the respective sending states. For instance, the Italian *Carabinieri* contingent (police force with a military status) operating within the International Police Task Force in Bosnia remained under authority of the Italian Defence Operational Command (*COI Difesa*). The effective employment planning was decided by the Office for Planning and Military Police of the 2nd Department of the *Carabinieri* General Command. The *Carabinieri* tactical commander was also tasked to gather and share intelligence information with the G2 cell (intelligence branch) of the SFOR MSU (the 'Multinational Specialised Units') Command in Sarajevo,[90] composed by another *Carabinieri* contingent formally operating under a different NATO command. In such cases, it is difficult to deny the existence of a direct relationship of the contingent with the sending state.

Moreover, the UN generally lacks legal authority to take punitive measures against CIVPOL officers. Any potential disciplinary proceedings for their misconduct remain in the responsibility of the contributing countries.[91] Although not decisive, these elements may provide further evidence of a remaining link with the sending state.

Notwithstanding the lack of clarity surrounding the issue of accountability of police forces in BiH,[92] one may argue that a potential co-responsibility of sending states cannot be excluded, once the chain of command ceases to be fully independent and allows for national control (even in part) over the deployed police contingent.

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[87] H. Hartz, 'CIVPOL: The UN Instrument for Police Reform', in T.T. Holm and E.B. Eide (eds.), *Peacebuilding and Police Reform* (London, Frank Cass 2000) pp. 27 at 30.

[88] M. Malan, 'Peacebuilding in Southern Africa: Police Reform in Mozambique and South Africa', in Holm and Eide, *supra* n. 87, pp. 171 at 175.

[89] T.T. Holm, 'CIVPOL Operations in Eastern Slavonia, 1992-1998', in Holm and Eide, *supra* n. 87, pp. 135 at 145.

[90] G. Moscati, 'La missione ONU – IPTF in Bosnia ed Erzegovina', 50(4) *Rassegna dell'Arma dei Carabinieri* (2002) p. 27.

[91] Simic, *supra* n. 86, at 19. However, the UN authorities may resort to the administrative action of repatriation; followed by a recommendation to the national authorities to take the appropriate action against the subject concerned.

[92] C. Cordone, 'Police Reform and Human Rights Investigations: The Experience of the UN Mission in Bosnia and Herzegovina', in Holm and Eide, *supra* n. 87, pp. 191 at 207.

2.3 UN accountability in practice

In the practice of UN operations, the Organization has initially acknowledged responsibility for activities carried out by its forces during both UNEF (United Nations Emergency Force) and ONUC (United Nations Operation in the Congo).[93] During the mission in the Congo, the UN Secretary-General affirmed that compensating individuals who had suffered damages legally attributable to the UN was a 'policy' of the Organization.[94] The UN liability to third parties did not encompass acts performed during combat, if justified by military necessity or otherwise by actions lawfully carried out in self-defense.[95] Out of approximately 1,400 claims submitted by Belgian nationals, the UN accepted responsibility in 581 cases. Following consultations with the Government of Belgium, a final lump-sum payment of $ 1.5 million was agreed.[96] During UNEF II, redresses for accidental killings by UN forces are reported as being accorded in the course of the operation.[97] In this respect, the UNEF Claims Review Board was instructed to accept applications concerning damages due to acts performed by UN troops, unless the latter were acting on behalf of a national government, or the government concerned had agreed to be responsible for the damages caused.[98]

The latter principle was applied in the context of the conduct of British troops in the United Nations Peacekeeping Force in Cyprus (UNFICYP). The British government was held liable for the actions performed by British troops in Cyprus, even if they were acting under the UN control. In this case, state liability was also recognized in respect of British protected people.[99]

The situation is slightly different in the course of missions in which the Organization acts a *de facto* government.[100] In this case, accountability for human rights violations may correctly be attributed to the UN itself.[101] Yet, such violations

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[93] D. Fleck, 'International Accountability for Violations of the *Ius In Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law', 11 *J. Conflict & Security L.* (2006), pp. 179 at 195; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn. (Cambridge, Cambridge University Press 2005), p. 402; Suzuki and Nanwani, *supra* n. 8, at p. 194; Murphy, *supra* n. 58, at p. 20.

[94] L.B. Sohn (ed.), *Cases on United Nations Law*, 2nd rev. edn. (Brooklyn, NY, Foundation Press 1967), p. 53.

[95] Report of the Secretary-General, *supra* n. 22, para. 13, at 703; Amerasinghe, *supra* n. 93, at p. 402.

[96] Ibid., at 712; Zwanenburg, *supra* n. 4, at p. 88.

[97] See Amerasinghe, *supra* n. 93, at p. 403.

[98] See Schmalenbach, *supra* n. 38, at p. 37.

[99] *Nissan* v. *Attorney General*, 1 *All ER* (1969) 629. See also on the case S.A. De Smith, 'Civis Britannicus Sum', 32 *Modern Law Review* (1969), pp. 427 at 431.

[100] Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them, UN Doc. S/1994/653 (1994), paras. 251-3.

[101] The problem is debated in Stahn, *supra* n. 7, at p. 137; R. Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and The Underlying Issues At Stake', 12 *ILSA Journal of International and Comparative Law* (2006), pp. 395 at 408.

are widely reported, together with the poor level of remedies adopted by international authorities.[102] The situation in Kosovo situation marks a good example. At the beginning of the mission, both UNMIK (United Nations Mission in Kosovo) and KFOR (NATO – led Kosovo Force) have created their own commissions for dealing with financial and other type of claims.

> 'However … UNMIK provide[d] no opportunity for individuals to be heard or represented by legal counsel in their proceedings and all decisions are taken by a panel of UNMIK staff members. The only appeal possible against this internal first instance decision [was] the sending of a "memorandum" to the UNMIK Director of Administration. In contrast, although first instance proceedings before KFOR call for a single KFOR officer to take a decision, the appeals process incorporate[d many elements of proper judicial proceedings, including an opportunity for individuals to be heard or legally represented.'[103]

It is noteworthy that only third party claims which do not arise from 'operational necessity' may be filed against both UNMIK and KFOR before the respective claims commissions.[104]

Moreover here is a general lack of external *fora* to challenge and repeal the Administrator's decisions. UNMIK refused to accept the creation of such a jurisdiction, in order to avoid compromising the privileges and immunities accorded to the mission and to its personnel and to maintain discretion to interpret the mandate conferred by the Security Council.[105] The Venice Commission of the CoE thus highlighted the need for a 'constitutional court' in Kosovo in 2004.[106]

Alternative accountability mechanisms, such as the Ombudsperson institution, have proven to be ineffective or anyway hampered by the same UN administration. The adoption of UNMIK Regulations 2006/06 and 2006/12[107] is exemplary in this respect. Regulation 2006/12 established a Human Rights Advisory Panel with a limited jurisdiction over complaints relating to alleged violations of human rights.[108] The findings or the recommendations of the Advisory Panel are of an

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[102] See Abraham, *supra* n. 42, at p. 1291; R. Caplan, *International Governance of War – Torn Territories* (New York, Oxford University Press 2005), p. 195. We have already tackled the subject in Tondini, *supra* n. 41, at p. 203.

[103] Ombudsperson Institution in Kosovo, Third Annual Report, 2002-2003, at 4-5 <www.ombudspersonkosovo.org>.

[104] UNMIK, Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, 18 August 2000, sec. 7 (UNMIK Regulations are available at <www.unmikonline.org>).

[105] See the Report, *supra* n. 43, para. 132, at 29-30.

[106] European Commission for Democracy Through Law (*Venice Commission*), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, 11 October 2004, Doc. No. CDL – AD (2004)033, para. 104 <www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp#_Toc85341413>.

[107] Respectively, UNMIK, Regulation No. 2006/06 on the Ombudsperson Institution in Kosovo, 16 February 2006; and UNMIK, Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, 23 March 2006.

[108] UNMIK Reg. 2006/12, Sec. 2: 'The Advisory Panel shall have jurisdiction over … complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising

advisory nature. The SRSG retained the exclusive authority and discretion to decide whether to act on them.[109] The establishment of the Panel was largely a political compromise between UNMIK and CoE and shaped by contradictions.

Members of the Advisory Panel are appointed upon the proposal of the President of the ECtHR.[110] Moreover, the Panel was created by UNMIK itself to 'address the effective lack of jurisdiction of the European Court of Human Rights over Kosovo.'[111] However, the formula chosen was guided by the intention to avoid possible judicial interferences by the ECtHR over cases occurred in Kosovo. This compromise may be characterized best in the words of the Ombudsperson Institution: '[H]aving a Human Rights Advisory Panel to examine complaints against UNMIK is better than nothing.'[112]

With the adoption of UNMIK Regulation 2006/06, the UN Administration excluded itself further from the jurisdiction of the Ombudsperson Institution, which 'may [merely] enter into a bilateral agreement' with the SRSG in case of proceedings involving UNMIK.[113] Similar agreements seem to be necessary for the Ombudsperson in order to access detention facilities run by both KFOR and UNMIK.[114]

As a consequence of the recommendations received by the *Venice Commission* in 2004, UNMIK and CoE entered into further agreements concerning the establishment of review mechanisms to partially hold UNMIK responsible in terms of human rights law while discharging its administrative duties. A first agreement related to the Framework Convention for the Protection of National Minorities (FCNM) was signed between UNMIK and the CoE in June 2004.[115] In August 2004, a further agreement was concluded between the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN administration.[116] The agreement basically provides the Committee's access to all UNMIK detention facilities, although initially it had to wait to be implemented, pending similar negotiations between the CPT and NATO with regard to KFOR detention facilities. After two years of negotiations, finally, on 19

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from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights'.

[109] Ibid., Sec. 17.

[110] Ibid., Sec. 5.1.

[111] UNMIK Press Release of 5 April 2006, UN Doc. UNMIK/PR/1525 <www.unmikonline.org>.

[112] Ombudsperson Institution in Kosovo, Sixth Annual Report, 2005-2006, at 26 <www.ombudspersonkosovo.org>.

[113] UNMIK Reg. 2006/06, sec. 3.4.

[114] Ibid., sec. 4.9.

[115] CoE, Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, 30 June 2004 (hereafter FCNM-UNMIK Agreement).

[116] CoE, Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 23 August 2004 (hereafter CPT-UNMIK Agreement). Both the CPT/FCNM-UNMIK agreements are included on the CD-ROM attached to the volume edited by Langholtz, Kondoch and Wells, *supra* n. 38.

July 2006, an agreement was concluded through an exchange of letters between NATO and the CoE, defining the modalities of inspections.[117]

However, it has to be noted that both agreements are extremely clear in specifying that UNMIK is not a party to the human rights conventions concerned and thus it is not bound by their provisions as a matter of treaty law. The CPT – UNMIK agreement was made with the aim to 'promote technical cooperation'.[118] The FCNM imposes a real (soft law) obligation of compliance, through reports to be submitted to the Committee of Ministers of CoE on a periodical basis.[119]

Eventually, in both Bosnia and Kosovo, countries participating in IFOR/SFOR and KFOR have investigated human rights violations allegedly committed by their troops.[120] Practice has shown that sending states may be subject to possible liability in circumstances where claim to hold primary jurisdiction over cases of human rights violations committed by their troops.[121] In a judgment before the High Court of Justice, the United Kingdom admitted vicarious liability for any wrongs committed by its troops in Kosovo, the Crown retaining command of the British forces notwithstanding that they were acting under the KFOR mandate.[122] A similar tendency may be observed in the case of Srebrenica. According to a report commissioned by the Dutch government to the Netherlands Institute for War Documentation, both the Netherlands (sending state) and the UN were deemed to share responsibility for having left the city undefended, despite the formal UN control of Dutch troops.[123] Such concurrent political responsibility has lately turned into potential civil liability. In 2005 a first lawsuit, which is still pendent, was filed by two Muslim families against the Dutch government and the UN,[124] while currently 7390 victims and surviving family members are planning to sue Netherlands and the UN in a civil procedure before the district court of The Hague.[125] The

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[117] CoE, Council of Europe Anti-Torture Committee gains access to NATO run detention facilities in Kosovo, 19 July 2006 <www.cpt.coe.int/documents/srp/2006-07-19-eng.htm>.

[118] CPT-UNMIK Agreement, *supra* n. 116, Preamble.

[119] FCNM-UNMIK Agreement, *supra* n. 115, Art. 2.3.

[120] Amnesty International, The Apparent Lack of Accountability of International Peace-Keeping Forces in Kosovo and Bosnia-Herzegovina, AI Doc. EUR 05/002/2004 (2004), at 3; Schmalenbach, *supra* n. 38, at p. 42.

[121] See Cerone, *supra* n. 65, at p. 486: 'The national governments of the contingents ultimately retain significant control over their soldiers, bolstering a finding of individual state accountability for the acts of the troops each state has contributed'.

[122] *Mohamet Bici and Skender Bici* v. *Ministry of Defence*, Decision of 7 April 2004, (2004) *EWHC* 786 (QB), para. 2 <www.hmcourts-service.gov.uk/judgmentsfiles/j2458/bici-v-mod.htm>.

[123] Netherlands Institute for War Documentation, Srebrenica, A 'Safe Area': Reconstruction Background, Consequences and Analyses of the Fall of a Safe Area <www.srebrenica.nl/en/a_index.htm>. See A.F. Lang, 'The United Nations and the Fall of Srebrenica: Meaningful Responsibility and International Society', in Erskine, *supra* n. 6, pp. 183 at 184.

[124] M. Simons, 'The Netherlands: New Srebrenica Massacre Suit', *New York Times*, 4 July 2006 <www.nytimes.com>.

[125] 'First, the court will decide whether the Dutch state shares responsibility – and thus liability – for the massacre. A second lawsuit would then focus on the amount of reparations' (U. Ludwig and A. Mertin, 'Srebenica Widows Sue UN, Dutch Government', *Der Spiegel*, 4 July 2006 <www.spiegel.de/international/spiegel/0,1518,425024,00.html>).

Dutch government, if summoned, could only rely on the limited territorial applicability of human rights law, as it had previously done with regard to the International Covenant on Civil and Political Rights (ICCPR) in order to avoid any responsibility before the Human Rights Committee for the same facts.[126]

3. The Role of the European Court of Human Rights: from the European Legal Space to the Creation of New 'UN Safe Havens'

The analysis of existing case law and practice concerning the responsibility of international organizations and states suggests that the issue of accountability deserves pivotal attention in the definition of the boundaries of a *jus post bellum*. Although scholars commonly acknowledge the role of international courts in 'closing the accountability gap',[127] international human rights supervisory and judicial bodies are often hesitant to interfere with the activity of international institutions, especially in cases concerning alleged human rights violations due to acts of member states carried out according to binding decisions of international organizations.[128] The ECtHR has traditionally offered effective protection of human rights by directly involving member states' responsibility for acts attributable to international organizations. However, this rationale has been partly abolished in the latest ECtHR rulings.

According to the jurisprudence of the Court, a transfer of powers to an international institution is compatible with the European Convention on Human Rights (ECHR) as long as the organization concerned secures a level of human rights protection (as regards both the substantive guarantees offered and the mechanisms controlling their observance) that is 'equivalent', i.e., 'comparable' to that granted by the Convention.[129] It may thus be argued that there is a rebuttable presumption in favour of compliance with human rights under the Convention, as long as the respective organization guarantees a comparable level of human rights protection.[130]

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[126] Dennis, *supra* n. 2, at p. 125.

[127] Wellens, *supra* n. 71, at p. 1179.

[128] Reinisch, *supra* n. 21, at p. 140; ibid., *supra* n. 52, at p. 868. The author reports the ECommHR decisions in *Melchers & Co.* v. *Federal Republic of Germany* (9 February 1990) and *Heinz* v. *Contracting Parties Who Are also Parties to the European Patent Convention* (10 January 1994).

[129] *Melchers & Co.* v. *Federal Republic of Germany*, Decision of 9 February 1990, 33 *Yearbook of the European Convention on Human Rights* (1990) pp. 46 at 52, para. 145; *Matthews* v. *United Kingdom*, Decision of 18 February 1999, 28 *EHRR* (1999) 361, at 390; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* v. *Ireland* (*Bosphorus* case), Decision of 30 June 2005, 42 *EHRR* (2006) 1, at 44-45, paras. 152 and 155. See also C. Eckes, 'Does the European Court of Human Rights provide protection from the European Community? – The case of Bosphorus airways', 13(1) *European Public Law* (2007) p. 47.

[130] Any such presumption might be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. See *Bosphorus* case, *supra* n. 129, para. 156, at 45.

Secondly, according to the jurisprudence of the Court, member states are held responsible for all acts and omissions of their organs regardless of whether the act or omission in question was a consequence of obligations under domestic or international law. The Court's power is considered to be general: this means that no part of a member state's jurisdiction is excluded from the scrutiny of the Court.[131] All states parties to the ECHR which are also members of international organizations may be said to be responsible *ratione materiae* (thus not only *ratione loci* or *personae*) for the wrongful consequences of the organization's decisions, if they have not ensured that the rights recognized in the Convention are effectively secured in the organization's decision-making and implementation process.[132] According to the jurisprudence of the Court, member states remain responsible for (*i*) transferring powers to international organizations without exercising the due control over their acts/decisions or for (*ii*) any wrongful act and omission committed by their organs operating within the organizations concerned. This finding has two important implications. It indicates that there is possibility to exercise review on a 'case-by-case' in order to ascertain the alleged violations;[133] moreover, it suggests that member states must have the possibility to challenge the way in which delegated powers are exercised by the organizations, because the latter are 'legally responsible under [their] constituent treaty to [their] member states for the way in which [they] exercise[s] [their] delegated powers.'[134]

Unfortunately, the application of these principles has been partly reversed by the Court in a decision on admissibility of the Gran Chamber in the *Behrami* and *Saramati* cases. Both cases concerned allegations of human rights violations committed in Kosovo by military personnel supposedly belonging to NATO.[135]

The *Behrami* case was brought following the killing/serious wounding of a Kosovar boy and his brother by unexploded NATO cluster bombs. The victims' relatives sued France for the violation of the right to life before the Strasbourg Court since the incident occurred in an area of Kosovo which came under the responsibility of a multinational brigade led by France.[136] UNMIK Police classified

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[131] Ibid., para. 153, at 44; *United Communist Party of Turkey and Others* v. *Turkey*, Decision of 30 January 1998, 26 *EHRR* (1998) 121, at 144, para. 29; *Capital Bank AD* v. *Bulgaria*, Decision of 24 November 2005 [unreported], para. 111 <www.echr.coe.int>.

[132] *Matthews* case, *supra* n. 129, at 362.

[133] See Judge Ress' concurring opinion in *Bosphorus*: 'The concept of a presumption of Convention compliance should not be interpreted as excluding a case by case review by this Court of whether there was really a breach of the Convention' (*Bosphorus* case, *supra* n. 129, at 52, para. O – II2).

[134] D. Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', 25 *Michigan Journal of International Law* (2004), pp. 1107 at 1133.

[135] *Behrami* & *Behrami* v. *France*, Appl. No. 71412/01, and *Saramati* v. *France, Germany and Norway*, Appl. No. 78166/01, Decision of 31 May 2007 [unreported] <www.echr.coe.int>. *Behrami* v. *France* was lodged with the European Court of Human Rights on 28 September 2000, while the application in the case of *Saramati* v. *France, Germany and Norway* was lodged with the Court on 28 September 2001. On 13 June 2006 the Chamber of the Court dealing with the cases relinquished jurisdiction in favour of the Grand Chamber, under Art. 30 of the ECHR.

[136] The case was communicated to the French government on 16 September 2003. The applicants argued that the French Command failed to take any steps to remove unexploded devices which it knew

the incident as 'an unintentional homicide committed by imprudence'.[137] No criminal prosecution was initiated. The further petition by the victims' relatives to the local KFOR claims office was unsuccessful as well. The claim that France had failed to comply with the de- mining provisions included in the Security Council Resolution 1244 was rejected on the grounds that mine clearance fell under responsibility of the UN as a whole as of 1999. Since the incident occurred in 2000, the responsibility for the boy's death could not be ascribed to a single participating country.[138]

The second case (*Saramati* case) concerns an alleged violation of the right to liberty. After being arrested (supposedly by a German police officer) by order of the KFOR Commander (a Norwegian officer at that time, subsequently replaced by a French one) the applicant was subjected to a form of executive detention for six months without any kind of judicial oversight.[139] Saramati was convicted of attempted murder by a Kosovar district court and transferred to a civil detention facility. Subsequently, his conviction was quashed by the Kosovo Supreme Court and he was released from detention. The claimant sued France, Germany and Norway before the ECtHR for alleged breaches of ECHR provisions, based on the nationality of the respective KFOR commanding and arresting officers.[140] The three defendants were supported by other six European governments[141] which submitted written observations to the Court, relying mainly on the prevalence of Security Council Resolutions over other international (including human rights) obligations of member states[142] and the lack of jurisdiction/effective control (exercised by the UN) by the respondent states over Kosovo or otherwise in respect of the applicants.[143] The intervening governments argued that exposing military operations abroad to the Court's scrutiny would represent a serious obstacle to the establish-

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were in the area in which the incident took place, in particular without informing local population of the dangers, and fence off or mark the area.

[137] ECtHR, Press Release No. 693, 15 November 2006 <www.coe.int>.

[138] Ibid.

[139] During the detention, the applicant's case was transferred to the district court for trial. During each trial hearing the applicant's representatives requested his release and the trial court responded that his detention was the responsibility of KFOR. We have already examined the issue of extrajudicial detentions in Kosovo in Tondini, *supra* n. 41, at p. 204.

[140] In particular, Art. 5 (right to liberty and security), Art. 13 (right to an effective remedy), Art. 6(1) (right to a fair trial).

[141] United Kingdom, Denmark, Estonia, Greece, Poland and Portugal (adopting the observations of the UK government), together with Germany, which submitted written observations as the application against it was withdrawn.

[142] By virtue of Arts. 25 and 103 of the UN Charter. This reasoning has been supported by Denmark (*Behrami & Saramati, supra* n. 135, para. 97), Estonia (para. 102), Germany (para. 106) and United Kingdom (para. 113). In this respect, resolutions adopted under Ch. VII of the Charter, as in the case of Kosovo, are indisputably binding on member states under Art. 25, while Art. 103 is considered by authoritative scholars not just a treaty norm, but a part of *jus cogens*. We have already considered the issue in Tondini, *supra* n. 41, at pp. 196-198.

[143] Position taken by France and Norway (ibid., paras. 83 and 95), Germany (para. 107), Greece (para. 109), United Kingdom (indirectly at para. 112).

ment of future peace operations.[144] The application against Germany was withdrawn upon request made by the applicant in November 2006.[145] The admissibility of the remaining cases against France and Norway was rejected on 31 May 2007.

The provisional decision of the Court on the admissibility of the cases and the following communication to the respondent states appeared to indicate that the Court might step back from the strict *espace juridique* doctrine (*Banković* case).[146] However, the final judgment confirmed it. The Court rejected the application on the basis of the lack of jurisdiction *ratione personae*. The Court noted that KFOR and UNMIK acted under a Chapter VII mandate at the time of the occurrence of acts. KFOR was legitimately authorized under Security Council Resolution 1244 to issue detention orders within the security mandate. UNMIK was responsible for the supervision of de-mining activities.[147]

The Court essentially refused to consider the *Behrami* case, because the alleged human rights violations were committed by an (independent) international organization (that is not a party to the European Convention). The settlement of the residual case depended on the legal nature of KFOR and the potential concurrent responsibility of participating states. The Court addressed the first question by attributing the responsibility for actions performed by KFOR directly to the UN (through the Security Council).[148] The concurrent responsibility of member states was ruled out by the 'effectiveness (including the unity) of NATO's operational command ... [and] control.'[149] Once the potential (also concurrent) responsibility for wrongful acts and omissions committed by member states' organs operating within KFOR (*supra* letter (*ii*)) was excluded, the crucial question remained whether the respondent states assumed a possible *culpa in vigilando* by transferring powers to NATO or the UN without exercising the due control (*supra* letter (*i*)) – a principle clarified in the *Bosphorus* decision. The Court recognized the need to interpret the Convention 'in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties', i.e., the prevalence of Security Council resolutions over other treaty obligations of UN member states.[150]

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[144] Ibid., paras. 90, 94 (France and Norway), 101 (Denmark), 108 (Germany), 111 (Poland), 115 (United Kingdom).

[145] Ibid., para. 64. Saramati was unable to produce any objective evidence in support of the involvement of a German KFOR officer in his arrest. On its side, Germany declared 'that, despite detailed investigations, they had not been able to establish any involvement of a German KFOR officer in Mr Saramati's arrest'.

[146] P. Leach, 'The British Military in Iraq: The Applicability of the *Espace Juridique* Doctrine Under the European Convention on Human Rights', *Public Law* (Aut. 2005), pp. 448 at 452.

[147] *Behrami & Saramati, supra* n. 135, para. 127.

[148] Ibid., paras. 133-137. The Court's reasoning may be summarized as follows. The Security Council retains the 'ultimate authority and control' over KFOR actions (para. 134). The 'operational command' has been legitimately delegated to NATO by the Security Council. NATO established KFOR together with non member states (para. 135). The link between KFOR and the Security Council is acknowledged in the duty for the Command of the military presence to report time by time to the Council, 'as to allow the UNSC to exercise its overall authority and control .... The requirement that the SG presents the KFOR report to the UNSC was an added safeguard' (para. 134).

[149] Ibid., para. 139.

[150] Ibid., para. 147.

As a consequence, the Court refused to extend its scrutiny to 'acts and omissions of Contracting Parties which are covered by UNSC Resolutions', arguing that such control would 'interfere with the fulfillment of the UN's key mission in this field including ... with the effective conduct of its operations'.[151] The Court

> 'consider[ed] that the circumstances of the present cases were "essentially different" from the *Bosphorus* case' since 'in the present cases, the impugned acts and omissions of KFOR and UNMIK [could] be attributed to the respondent States',

whereas in the *Bosphorus* case the alleged violations had taken place on the Irish ground and could be imputed to the Irish government.[152]

The reasoning of the Court in the *Saramati* case is visibly guided by intention not to derogate from the principle of potential control over member states, as declared in *Bosphorus*. However, the Court's ruling is *prima facie* illogic[153] and regrettable in its outcome. The decision provides virtually a blank cheque for UN member states which participate in international operations. These operations are typically mandated, but not directly controlled by the Security Council. This construction leaves a considerable room for the creation of 'UN safe heavens'. The jurisprudence of the ECtHR appears to be more restrictive than the case law of the EC Court of First Instance, which allowed scrutiny in cases concerning the violation of *jus cogens* norms in the implementation of Security Council Resolutions.[154]

Most importantly, when addressing the issue of the respondent states' potential responsibility, the Court failed to take into account the ILC Draft Articles on Responsibility of International Organisations presented during the Commission's

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[151] Ibid., para. 149.

[152] Ibid., para. 151.

[153] The attribution of the acts performed by KFOR troops to the UN seems bizarre. UN SC Res. 1244 (1999), which has given both KFOR and UNMIK the mandate to operate in Kosovo, does not draw up any real functional or hierarchical link between the military presence and the Security Council, which on the contrary merely obliges the former to submit reports to it at regular intervals (para. 11). Since the operational command and control was in the hands of a military force mostly belonging to NATO, the attribution of the potential human rights violations to the sole UN was therefore misjudged. Secondly, in referring to Arts. 25 and 103 of the UN Charter, the Court failed to consider the possible applicability of customary human rights law and *ius cogens* provisions. Thirdly, the Court argued that the circumstances of the *Bosphorus* case differ from those in the *Saramati* decisions since the violations were carried out by a specific member state in the former case, while the latter concerned acts attributable to an international organization. In this context, the Court failed to consider the potential responsibility of contributing states for *culpa in vigilando*, as provided in the *Bosphorus* case.

[154] *Yusuf* v. *Council of the European Union*, Case T-306/01, Decision of 21 September 2005, para. 277; *Kadi* v. *Council of the European Union*, Case T-315/01, Decision of 21 September 2005, para. 226; *Ayadi* v. *Council of the European Union*, Case T-253/02, Decision of 12 June 2006, paras. 101 and 116; *Hassan v. Council of the European Union*, Case T-49/04, Judgment of 12 July 2006, para. 92, all available at <http://curia.europa.eu/it/content/juris/index.htm>. See also R.S. Brown, 'Kadi v. Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level', 4 *EHRLR* (2006), p. 456; M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', 19 *LJIL* (2006) p. 753.

2006 session.[155] Draft Article 28 provides that a member state may be deemed internationally responsible when an international organization commits an act that, if committed by that state, would constitute a breach of an international obligation for it.[156] The saving clause included in the following Draft Article 29 extends the responsibility of member states for internationally wrongful acts of an organization to cases in which that state 'accept[s] responsibility for that act'; or 'has led the injured party to rely on its responsibility'. [157]

4. Conclusion

Assuming that states are bound not only to respect obligations flowing from international norms, but also to secure or ensure their respect, as in the case of states parties to the ECHR (Article 1), it becomes 'a conventional obligation for them to provide adequate supervision so that the international organization acts within the constraints of law.'[158] Thus, in theory, 'no situation should arise where an [international organisation] would not be accountable to some authority for an act that might be deemed illegal.'[159] However, current legal framework falls short of meeting this ambition. The direct responsibility of international organizations to third parties for breaches of human rights law may be enforced only by recourse to internal claims bodies. There is hardly any possibility to ensure review by external *fora*.

One option to overcome this dilemma may the growing trend to sue member states directly before both domestic and international courts. If member states' responsibility was ascertained as a rule, it would entail important consequences. It might pave the way towards a general rethinking of the role and powers of international institutions. Addressing accountability gaps in the UN system, for example, might serve as a catalyst for reform and similar thinking with respect to other com-

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[155] Report of the International Law Commission, UN Doc. A/61/10 (2006), paras. 77-91, pp. 246-292.

[156] ILC Draft Art. 28 (International responsibility in case of provision of competence to an international organization): 1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization. Interestingly, the Commentary of Draft Art. 28 relies exactly on the above – cited *Bosphorus* and *Waite and Kennedy* judgments (ibid., at 284-285).

[157] ILC Draft Art. 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization): 1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if: (*a*) It has accepted responsibility for that act; or (*b*) It has led the injured party to rely on its responsibility. 2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary. As regards responsibility of member states, stemming from violations of international obligations, to subjects other than nations or international organizations see the Commentary of Draft Art. 29 (ibid., at 290).

[158] K. Wellens, 'Accountability of International Organizations: Some Salient Features', 97 *ASIL Proceedings* (2003), p. 241, referring to the ECtHR case in *Matthews* v. *United Kingdom*.

[159] ILA, *supra* n. 12, at p. 254.

parable international organizations (i.e., organizations dealing with human rights promotion or performing traditional state functions in developing countries or post-conflict situations).

The conception of accountability is a key factor in the definition of a *jus post bellum* (i.e., the development of a normative framework for peace-making).[160] The legal rules emerging in this context must be common and must extend to the 'victor', which cannot be deemed as *legibus solutus* just because it is represented by an institution with a distinct international legal personality. Why should one distinguish public authority exercised by international organizations and states acting abroad from authority of domestic entities? The latest ECtHR case law appears to imply that the implementation of Security Council Resolutions must be kept untied from legal obligations in order to guarantee 'the effective fulfilment ... by the UN of its imperative peace and security aim'.[161] The downside of this conception is that it excludes the UN, its agents and even its 'contractors' (i.e., mandated states and international organizations) *de facto* from any compelling external scrutiny. Such a result is difficult accept in the context of a global system based on law and accountability.

Accountability is a fundamental premise of every functioning legal system. The existence of adequate checks and balances is necessary in order to make a system work properly. The same should apply at the international sphere, and in the construction of a legal framework for transitions from conflict to peace. Obliging the victor to respect rules other than its own should be the *leitmotif* of the law of armed conflict.

[160] That is to say '[a] broader regulatory framework ("post–conflict law"), which encompasses substantive legal rules and principles of procedural fairness governing transitions from conflict to peace' (see Stahn, *supra* n. 3, at p. 937).

[161] *Behrami & Saramati, supra* n. 135, para. 149.

Chapter 11
JUS POST BELLUM AND TRANSITIONAL JUSTICE

Mark Freeman* and Dražan Djukić**

Abstract
This essay focuses on possible ties between the concepts of transitional justice and jus post bellum. It does not aim to provide a detailed legal analysis, but raises questions and, where possible, indicates tentative directions for a linkage between the two concepts. The first part of the essay introduces the concept of transitional justice. This is followed by an examination of the position of transitional justice within the current law of armed conflict. The third and final part of the essay provides an analysis of the relationship between transitional justice and the emerging concept of jus post bellum.

1. What is Transitional Justice?

1.1 Roots

Transitional justice is a new field linked to the broader domain of human rights.[1] Its historical roots may be traced back to Nuremberg and earlier. The aftermath of WW II, for example, saw major war crimes trials, massive reparations programs, widespread purges in the justice and security sectors, and disparate efforts at national reconciliation. But the emergence of transitional justice as a field in its own right is, however, more typically linked to the waves of democratic transition that occurred in Southern Europe in the 1970s, in Latin America in the 1980s, and in Central and

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[1] See, e.g., Aspen Institute, *State Crimes. Punishment or Pardon: Papers and Reports of the Conference, November 4-6, 1988, Wye Centre, Maryland* (Queenstown, Md., Aspen Institute 1989); B. Ackerman, *The Future of Liberal Revolution* (New Haven, Yale University Press 1992); N. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC, United States Institute for Peace Press 1995); N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York, Oxford University Press 1995); A. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (London, University of Notre Dame Press 1997); R. Rotberg and D. Thompson (eds.), *Truth v. Justice* (Princeton, Princeton University Press 2000); R. Teitel, *Transitional Justice* (New York, Oxford University Press 2002); A. Henkin (ed.), *The Legacy Of Abuse* (New York, The Aspen Institute and NYU School of Law 2002); M.C. Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, NY, Transnational 2002); R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, Polity Press 2002); J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, Cambridge University Press 2004).

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Eastern Europe, Africa, and Asia in the 1990s and beyond. It also tends to be linked to contemporaneous waves of post-conflict transition that occurred in places as different as El Salvador, Sierra Leone, and the former Yugoslavia. The term itself, 'transitional justice', entered the modern political lexicon only in the early post-Cold War period.

1.2 'Transition' and 'justice'

As one might expect, the field of transitional justice is focused on 'transitions' and 'justice'.

The notion of 'transition' is a contested one. Some reject it altogether, arguing that states and societies are in constant social and political evolution, and that there is hence no coherent distinction that can be made between 'transitional' and 'non-transitional' states and societies. But transitional justice practitioners use the term 'transition' to refer above all to the early period of a formal transition from war to peace or from authoritarian rule to democratic rule. Even transitions of these classic types can, however, vary greatly. For example, the democratic transition in Greece in the 1970s was relatively rapid and unconstrained, whereas the one in Chile in the late 1980s and early 1990s was generally slower and more partial. The post-conflict transition in Rwanda in the 1990s involved a clear military victor able to largely impose the terms of the post-conflict period, whereas the one in Nicaragua did not. Further contextual differences may also be pertinent to the transition. For example, international organizations like the UN may or may not be directly involved; a transition may be catalyzed by foreign intervention or, conversely, by internal armed rebellion; the worst violations might have taken place long before the transition or they might have continued right up until the moment of transition; and so forth.

Despite the myriad of possible differences in the features of any 'transitional' context, there is nevertheless at least one common feature shared by all: the existence of a legacy of mass abuse. It is here that the 'justice' component of transitional justice enters: transitional justice focuses on how to deal with such a legacy in a time of transition – whether from war to peace, authoritarian rule to democratic rule, or a more subtle transition from impunity to accountability.

In theory and in practice, the transitional justice conception of 'justice' is very broad and open-ended. As described in a recent important UN report on the subject:

> 'Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.'[2]

[2] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, p. 4.

1.3 **Dilemmas**

Although transitional contexts engender a wide array of moral, legal, and political dilemmas, the challenge of dealing with the past is one of the most intractable ones. That is because, in such contexts, the demand for justice is typically at or near its apex whereas the possibility of delivering justice is typically at or near its nadir. Why this is so is explained, in large measure, by the realities that circumscribe most transitional contexts.

In the aftermath of a period of widespread and systemic violations, there is often a loud cry for justice and, more generally, for an end to impunity. This cry is often articulated as a matter of principle; justice must be pursued for its own sake. But it may equally be articulated as a matter of pragmatism; justice must be pursued in order to re-establish the rule of law, to prevent the public from taking justice into its own hands, and to ensure the criminal law's goal of specific deterrence.

In transitional periods, however, it is difficult for even the best-intentioned governments to respond effectively to such cries. For example, long after the guns have turned silent and constitutional rule has been restored, there is often a delicate balance of power that continues to constrain the capacity of successor governments to pursue justice. Ousted regimes and demobilized combatants often retain strongholds of power which may threaten the new government should it attempt to hold its members to account. A transitional society's decimated institutional framework could additionally hamper its pursuit of justice. The justice system in periods of transition tends to be in highly dysfunctional condition, as the majority of police, prosecutors, and judges may be too weak or corrupt to be of any use in vindicating victims' rights to justice. In such periods, frequently there is also an acute caseload problem, with thousands of victims *and* thousands of perpetrators – far more than any justice system can handle within a reasonable delay, let alone one in dysfunction.

Equally challenging is the fact that key evidence of past crime is usually missing or destroyed, making it difficult to produce sound indictments and convictions. Moreover, witnesses to past crime may remain too afraid to appear in court to give evidence due to real or perceived threats of harm to them and their families. Legal obstacles to justice in the form of amnesty laws, lapsed prescription periods, or lacunae in a state's positive law may constitute further obstacles to justice. A rise in current crime is another common problem of transitional contexts, forcing many successor governments to focus on present-day crime at precisely the moment when they might, instead, need or wish to focus their limited judicial resources on the worst crimes of the prior period of repression or conflict. Poverty may also be an endemic feature of the society, rendering it difficult to justify costly trials to a public lacking in basic food and shelter.

All of these common realities help explain transitional justice's core dilemma of high demand, but low prospects, of delivering adequate justice. They also point toward at least three immediate consequences, all of which, in combination, serve as the intellectual and operational starting points for the contemporary field of transitional justice.

A first consequence of these realities is the guarantee of incomplete justice. Incomplete justice is not merely likely in transitional contexts; it is guaranteed. After all, criminal justice systems are designed to deal with crime as an exceptional occurrence. When crime becomes the rule, as it does in times of repression or conflict, no justice system can fully cope with the fallout, least of all one in a state of transition.

A second consequence of these realities is more positive, namely, the recognition that judicial responses are not enough. However important they may be, judicial responses cannot, alone, deal with the multiple and complex prejudices engendered by past abuse of a massive and systemic character. Judicial approaches need to be accompanied by non-judicial approaches of the sort described below.

A third consequence of these realities is an appreciation of the fact that justice, truth, reparation, and reform cannot and should not be pursued in a policy vacuum, but must instead be balanced with other public interest objectives, including the consolidation of peace and democracy and the need for economic development and public security.

Transitional justice, in short, does not endorse the maxim: 'Let Justice be done, though the Heavens may fall'. Instead, transitional justice is about the pursuit of a responsible form of justice that takes into account the parallel need for peace, democracy, security, and economic growth, precisely in order to deliver a form of justice worthy of the appellation.

1.4 **Mechanisms**

In theory and in practice, transitional justice focuses on four main mechanisms: criminal prosecutions, truth commissions, victim reparation programs, and institutional reform strategies.

Criminal prosecutions are preferably carried out at the national level, where they have the greatest potential to contribute to deterrence – both specific and general – and the restoration of local confidence in the rule of law. Prosecutions also may be conducted in third states through reliance on legal principles such as universal jurisdiction, or alternatively through reliance on specific treaty commitments. Many *ad hoc* international and mixed criminal tribunals also have emerged in recent years to deal with specific countries and regions such as Rwanda, the former Yugoslavia, Timor-Leste, Sierra Leone, Bosnia-Herzegovina, and Cambodia. There is also, of course, a permanent International Criminal Court in place today to try the international crimes of genocide, crimes against humanity, and war crimes, *inter alia*, where states parties are unable or unwilling to do so.

Truth commissions are *ad hoc* and victim-centred commissions of inquiry established in, and authorized by, states for the primary purposes of investigating and reporting on key periods of recent past abuse, and of making recommendations to remedy such abuse and prevent its recurrence. There have been scores of truth commissions created around the world, the most famous – but most anomalous – of which remains the South African Truth and Reconciliation Commission. Truth com-

missions, like the South African one, that hold public hearings for victims, seem to have an especially profound impact on public awareness and debate about past abuse. There is, however, a wide diversity of truth commission models, only some of which encompass such hearings.[3]

Victim reparation programs are out-of-court, state-sponsored schemes whose primary aim is to contribute to repairing, on a massive scale, the material and moral consequences of past abuse endured by victims and their families. Contemporary reparation programs typically encompass compensation payments to victims and their families, as well as privileged or dedicated access to certain public or private services, such as health care, pension, and educational services. Such programs increasingly encompass various collective and symbolic forms of reparation too, including memorials to preserve and honour the memory of victims.[4]

Institutional reform strategies aim, above all, to guarantee the non-repetition of serious abuse. Some of the most prevalent strategies, such as 'vetting programs', constitute a complementary form of sanction that can help fill the impunity gap left in the wake of any period of mass abuse. The primary aim of vetting programs is to transform public servants – especially in the justice and security sectors – from instruments of repression or corruption into instruments of public service and integrity. A typical vetting program involves three main phases: registration in the program, which may be mandatory; assessment of the applicants, based on information given on self-completed registration forms and supplemented by credible independent sources; and de-certification of those deemed unfit to work in the public institution in question. Vetting may also be preceded by a census and identification process aimed at determining a precise registry of who is, officially or unofficially, a member of the particular public institution.[5]

The above mechanisms of transitional justice are by no means exhaustive. Civil suits may be just as important as criminal prosecutions in some contexts; the investigations of national human rights commissions or international commissions of inquiry may yield results that are just as significant as those of truth commissions; official apologies may sometimes have an impact that is, in moral terms, just as profound as material compensation; and constitutional and legal reforms may be as essential as vetting programs to ensuring the prevention of future abuse. However, the four mentioned mechanisms constitute the primary means through which contemporary transitional justice is practiced.

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[3] See, e.g., P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity* (New York, NY, Routledge 2001); M. Freeman, *Truth Commissions and Procedural Fairness* (New York, Cambridge University Press 2006).

[4] See, e.g., P. de Greiff (ed.), *The Handbook on Reparations* (New York, Oxford University Press 2006); L. Boserup and G. Ulrich (eds.), *Reparations: Redressing Past Wrongs* (The Hague, Kluwer 2003).

[5] See, e.g., Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Vetting* (Geneva, United Nations 2006).

1.5 Legal doctrine

As a legal doctrine, the field of transitional justice is conceptually wedded to the broad approach to human rights articulated in a watershed 1988 decision of the Inter-American Court of Human Rights: *Velásquez Rodríguez* v. *Honduras*.[6] The essence of the decision has been explicitly endorsed in the court's subsequent jurisprudence, and implicitly affirmed in the jurisprudence of the European Court of Human Rights as well as in various UN resolutions and documents such as the Secretary-General's 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*[7] and the so-called Updated UN Principles to Combat Impunity.[8] In brief, the court held that all states have four fundamental obligations in the area of human rights. These are: to take reasonable steps to prevent human rights violations; to conduct a serious investigation of violations when they occur; to impose an appropriate punishment on those responsible for the violations; and to ensure reparation for the victims of the violations.[9] These obligations, taken as a whole, constitute a concise synthesis of the doctrinal underpinnings of transitional justice.

The mechanisms of transitional justice constitute practical means by which states can put these obligations into effect. For example, states may implement their obligation to investigate and punish perpetrators of serious human rights violations by conducting criminal trials. They may implement their obligation to investigate and identify perpetrators and victims of serious human rights violations by establishing fact-finding bodies such as truth commissions. A victim reparation program is a means by which a state can implement its obligation to provide restitution and compensation for serious human rights violations. And a vetting program is a method by which a state can partially implement its duty to take effective measures to avert future serious human rights violations.

1.6 Conclusion

Transitional justice provides a wide array of mechanisms for states seeking to reckon with a legacy of past transgressions as they move from conflict to peace or from repressive rule to more democratic forms of governance. It is a holistic, victim-oriented doctrine that aims to promote responsible local ownership and context-based policy-making.

Ultimately, of course, there is no simple panacea for dealing with a past marked by massive and systemic abuse. Each society should – indeed must – choose

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[6] *Velásquez Rodríguez* v. *Honduras,* Inter American Court of Human Rights, Judgment of 29 July 1988, Series C No. 4.

[7] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, supra* n. 2.

[8] D. Orentlicher, *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

[9] In subsequent jurisprudence, the court declared further complementary state obligations, including the obligation to identify both the victims and perpetrators of human rights violations.

its own path. At the same time, transitional justice teaches us that the choices a society makes are more likely to be effective where they are based on a serious study both of the demands of international law and of the successes and shortcomings of other societies that confronted similar dilemmas.

2. Transitional Justice and Jus Ad Bellum/Jus in Bello

Before examining the emerging concept of *jus post bellum*, we consider it important to briefly analyze the position of transitional justice in relation to the existing categories of *jus ad bellum* and *jus in bello*.

2.1 Links between transitional justice and the existing legal framework

Connections between transitional justice and *jus ad bellum*, the law governing the resort to armed force, may not be immediately apparent but exist nonetheless. Few conflicts remain strictly confined to a state's borders, and third states, directly or through proxies, often support sides in internal or international conflicts in various manners. When dealing with a legacy of armed conflict, transitional justice measures may take account not only of the consequences of such conflicts, but also of the roles and motivations of their participants, and hence of questions of *jus ad bellum.* This is of course familiar territory for many courts, not least the International Court of Justice (ICJ). In 2005, for example, it considered Uganda's military intervention in the Democratic Republic of Congo 'a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.'[10] Truth commissions, too, may tackle issues of *jus ad bellum.* The South African Truth and Reconciliation Commission discussed *jus ad bellum* issues in connection with the responsibility of the African National Congress for certain misdeeds.[11] Other overlap between transitional justice and *jus ad bellum* may take the form of apologies or compensation for the illegal use of force by one state against another.

More obvious and direct ties exist, however, between transitional justice and *jus in bello*, the law governing the resort to armed force. Most important, in legal terms, are the 1949 Geneva Conventions and the 1977 Additional Protocols. These treaties aim, in general, to limit the suffering of those not taking part, or no longer taking part, in hostilities and to restrict the methods and means of warfare. They also contain various provisions that directly overlap with transitional justice.

All Geneva Conventions, for example, contain references to penal measures, which in principle are applicable both *in bello* (i.e., in the midst of conflict) and *post bellum* (i.e., after the conflict has formally ended). With regard to grave breaches of the Geneva Conventions, each one indicates that a High Contracting Party is required

[10] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, International Court of Justice, Judgment of 19 December 2005, General List No. 116, p. 165.

[11] Truth and Reconciliation Commission of South Africa, Report*,* Vol. Six, pp. 465-468.

> 'to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'[12]

Under certain conditions such persons may, alternatively, be handed over for trial to another High Contracting Party concerned.[13] Additionally, as indicated by the Commentaries to the Geneva Conventions, the handing over of an accused to an international criminal court is not excluded by the terms of the treaty.[14] Additional Protocol II (APII), which relates to non-international armed conflicts, also contains a provision allowing for 'prosecution and punishment of criminal offences related to the armed conflict' and, to that end, sets out various judicial guarantees.[15]

For all other acts contrary to the Geneva Conventions, but not amounting to grave breaches, the Conventions indicate that High Contracting Parties must take all necessary measures for their suppression.[16] These provisions seem to open the possibility for non-judicial responses within the field of transitional justice, such as security sector reform programs, as a means to avoid ongoing and future violations.

The Geneva Conventions also provide for the possibility, 'at the request of a Party to the conflict' and 'in a manner to be decided between the interested Parties', of instituting an enquiry concerning any alleged violation of the terms of the Conventions.[17] Such an enquiry could play a role akin to a truth commission. The Commentaries to the Geneva Conventions mention, however, that from the beginning of the *travaux préparatoires* until the Diplomatic Conference of 1974-1977, no states established such an enquiry.[18] Subsequently, Additional Protocol I (API) established an International Fact-Finding Commission competent to 'enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol' and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol'.[19] Although the Commission exists, as of this writing, its services never have been put to use.

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[12] See, 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), Art. 49; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), Art 50; 1949 Convention relative to the Treatment of Prisoners of War (GCIII), Art 129; 1949 Convention relative to the Protection of Civilian Persons in Time of War (GCIV), Art 146.

[13] Ibid.

[14] J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949* (Geneva, ICRC 1960) p. 593.

[15] See, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII), Art. 6.

[16] GCI, Art 49(3); GCII, Art 50(3); GCIII, Art. 129(3); GCIV, Art. 146(3).

[17] GCI, Art. 52; GCII, Art. 53; GCIII, Art. 132; GCIV, Art. 149.

[18] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Dordrecht, ICRC, Martinus Nijhoff Publishers 1987) p. 1040.

[19] See, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API), Art. 90(2)(c)(i), (ii).

Also contained in API is the general principle that all actors in an international conflict must, in discharging their obligations with regard to missing and dead persons, ensure 'the right of families to know the fate of their relatives'.[20] This principle has helped spur the establishment of various truth commission-like bodies in different contexts including, for example, Commissions on Missing Persons in most of the states of the former Yugoslavia.[21]

Compensation, another important tool of transitional justice, is considered a principle of customary international law.[22] It is, moreover, an explicit obligation of API Article 90, which declares that a party that violates the provisions of the Geneva Conventions is liable to pay compensation. However, as noted by the Commentaries,

> 'there has always been a tendency for the victors to demand compensation from the vanquished, without reciprocity and without making any distinction between the damages and losses resulting from lawful or unlawful acts of war.'[23]

A final point worth recalling is the fact that, as a matter of international law, human rights law remains applicable in armed conflict no less than IHL. The ICJ has ruled 'that the protection offered by human rights conventions does not cease in case of armed conflict'.[24] In addition, in relation to contexts of occupation – which are covered by the fourth Geneva Convention – the ICJ held that the International Covenant of Civil and Political Rights also can apply. It has an extra-territorial scope of application that requires states to honour their human rights obligations even when exercising jurisdiction outside their territory, thus enabling the possibility of transitional justice measures that might otherwise be precluded by the fourth Geneva Convention.[25] The Inter-American Commission on Human Rights and the European Court of Human Rights have adopted similar views on the extraterritorial application of human rights under, respectively, the American Declaration on the Rights and Duties of Man and the European Convention on Human Rights.[26]

2.2 Limitations of jus in bello from a transitional justice perspective

The preceding comments are not intended to suggest that transitional justice and the current law of armed conflict (*jus ad bellum/jus in bello)* are perfectly compat-

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[20] Ibid., Art. 32.

[21] Freeman, *supra* n. 3, p. 49.

[22] Sandoz, Swinarski and Zimmermann (eds.), *supra* n. 18, p. 1053.

[23] Ibid., p. 1054.

[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* International Court of Justice, Advisory Opinion of 9 July 2004, General List No. 131, p. 106.

[25] Ibid., p. 111.

[26] See, e.g., *Armando Alejandre Jr., Carlos Costa, Mario De La Peña, And Pablo Morales* v. *Cuba*, Inter-American Commission on Human Rights, Report on the Merits of 29 September 1999 (Report No. 86/99), pp. 23-25 and *Loizidou* v. *Turkey,* European Court of Human Rights, Preliminary Objections Judgment of 23 March 1995 (A310), pp. 59-64.

ible. There also are legal and conceptual tensions and gaps that one can discern, which could motivate the emergence of a *jus post bellum*.

First, the thresholds of application set by the Geneva Conventions may serve as a limitation on states' obligations to deal with legacies of mass abuse. The Geneva Conventions apply to '… all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties …' and '… to all cases of partial or total occupation of the territory of a High Contracting Party …'[27] Pursuant to API Article 1(4), the Conventions equally apply to '… armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination …' Thus, in order to trigger the transitional justice-related obligations of the Geneva Conventions and API, a conflict of the sorts described above would have to exist. However, as is well-known, in past decades there has been a shift *away* from classical inter-state and anti-colonial conflicts and *toward* more intra-state conflicts. While APII could potentially help fill the breach, its even higher threshold of application represents a serious and practical impediment both for protection and transitional justice purposes.[28] As for common article three to the Geneva Conventions, which imposes a lower threshold of application to conflicts of a non-international character, it unfortunately lacks any affirmative transitional justice provisions. Instead, it simply states what is *not* permitted, namely 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court …' As to the possible customary nature of some or all of the provisions of the Geneva Conventions and the Additional Protocols, this issue appears to remain an area of ambiguity for legal scholars. For example, it is widely accepted that the obligation to prosecute or extradite those accused of grave breaches has attained customary status, but it remains unclear whether the same can be said of the equivalent obligation expressed in API.[29]

Second, the law of occupation – whose connection to *just post bellum* is discussed in more detail in another contribution to this symposium – regulates a situation of limited duration during which occupying powers, as set out in the 1907 Hague Regulations and the fourth Geneva Convention, have certain obligations in the aftermath of a conflict. It is, however, a rather conservative legal regime requiring the Occupying Power to exercise restraint in its activities. For example, penal laws in the occupied territory must remain in force except in cases where they would constitute a threat to the Occupying Power's security or an obstacle to the application of the fourth Convention.[30] However, in the case of a relatively benevolent occupation intended to rescue a failed state from further violence and chaos, it will usually be crucial for the 'occupier' to have the authority to enact various criminal law-related reforms. Thus, even though it could be in the best interests of the 'occupied' population, as well as broadly consistent with a human rights and

[27] GCI-IV, Art 2.
[28] APII, Art. 1.
[29] API, Art. 85.
[30] GCIV, Art. 64.

transitional justice framework to implement reforms, such measures would be in direct tension with existing occupation law.

Third, although there is increased convergence and interplay between human rights law and IHL, their exact relationship is still unclear in some aspects.[31] As the ICJ has noted, '… some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.'[32] A *lex specialis* theory could resolve conflicts between clashing provisions, but variations on *lex specialis* exist, too, which could affect transitional justice's foundation. For example, as mentioned above, transitional justice treats the investigation of past violations as one of the state's fundamental obligations in the area of human rights. Depending on the prevailing *lex specialis* argument, a state's obligations with regard to lawful acts of war could be altered considerably.

Finally, there is the question of amnesty within *jus in bello*. APII Article 6(5) provides:

> 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.

This provision aims to encourage amnesty at the end of a civil war for combat activities that would otherwise be subject to prosecution due to the fact that they violate the criminal legislation of the states in which they occur (e.g., for the crimes of sedition and treason). According to the ICRC, the provision never was intended to cover serious violations of IHL, and yet several states and courts regrettably have invoked it for precisely that purpose.[33]

3. Transitional Justice and a Tripartite Conception of the Law of Armed Force

3.1 Introduction

Proponents of *jus post bellum*, some of whom have contributed to this symposium, purport to transform the current dualist conception of the law of armed force into a tripartite structure. They seek, in particular, to institute 'rules and principles governing peace-making after conflict'.[34] This has a certain appeal to proponents of

[31] See, e.g., M. Freeman, 'International Law and Internal Armed Conflicts: Clarifying the Interplay Between Human Rights and Humanitarian Protections', *The Journal of Humanitarian Assistance*, July 2000, at <http://www.jha.ac/articles/a059.htm>.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* n. 24, p. 106.

[33] *The Azanian Peoples Organization (AZAPO)* v. *the President of the Republic of South Africa*, Case CCT 17/96, 25 July 1996, pp. 31-32.

[34] See C. Stahn, 'Jus ad bellum', 'jus in bello' ... 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force, 17 *EJIL* (2006), p. 943.

transitional justice, because at first blush there would seem to be a close nexus between the two concepts. However, the articulation of many elements of *jus post bellum* remains incomplete at this stage, and therefore it is difficult to assess the degree of harmonization with transitional justice that would be possible or desirable. Accordingly, this final section focuses less on prescriptions for a transitional justice link to *jus post bellum*, and more on questions that still need to be answered in order to make substantive advances on the topic.

3.2 The relationship between jus ad bellum, jus in bello and jus post bellum

A first question to be posed is how *jus post bellum* would relate to the already existing categories of the law of armed conflict, i.e., *jus ad bellum* and *jus in bello.* It could be argued that the strict separation between *jus ad bellum* and *jus in bello* should be maintained with regard to the proposed third category. This would entail that *jus post bellum* obligations would exist independent and irrespective of *jus ad bellum* and/or *jus in bello* considerations. Yet there seems room to argue that a strict severance between, especially, *jus ad bellum* and *jus post bellum*, could be relaxed. For transitional justice, at least, it is largely irrelevant whether or not *jus post bellum* is connected or disconnected from *jus ad bellum* and/or *jus in bello*. From a transitional justice perspective, what is paramount is the effort to provide truth, justice, reparation, and reform in the aftermath of a conflict.

3.3 Jus post bellum rules and principles

It is unclear whether proponents of *jus post bellum* envisage an entirely new set of rules and principles for ensuring post-conflict peace or whether they instead envisage the transposition, modification, or expansion of existing legal norms. Whatever the case, it is unlikely the choice would ever displace transitional justice's insistence on the use of a human rights framework in a post-conflict period. Moreover, as explained above, human rights remain applicable in armed conflict, and states' obligations under human rights instruments do not cease to apply when jurisdiction is exercised outside a state's own borders, as in a situation of occupation. At the same time, there is no denying the existence of lacunae and ambiguities in both IHL and the law of human rights, some of which could be addressed by *jus post bellum*. For example, as previously noted, the law of occupation could present problems for transitional justice initiatives since it could limit the flexibility required of an occupier to initiate required institutional reforms aimed at creating public institutions that respects basic human rights. Some of occupation law's restrictions could be eased through *jus post bellum* in order to facilitate legal reforms, vetting programs, and similar measures. In a similar vein, *jus post bellum* could help set the legal record straight on amnesties, and potentially go further by taking into account recent state and multilateral practice which treats as presumptively impermissible the provisions of any amnesty law purporting to oust the jurisdiction of courts to judge

persons accused of genocide, crimes against humanity, or war crimes.[35] It could also provide greater clarity as to the permissible scope of human rights law's derogation and limitation clauses, some of which could be applicable in the immediate aftermath of conflict, when national emergency-like conditions may prevail.

3.4 Jus post bellum exigencies

Closely connected to the previous issue is the question whether, in matters of transitional justice, *jus post bellum* would place higher or lower demands upon states than international human rights law. One could imagine that, in the wake of a devastating conflict, standards might be lowered in order to allow successor governments to prioritize economic and security issues rather than justice issues. Yet such an approach would not accord with current thinking in the field of transitional justice, which holds that it is precisely *in* the post-conflict period that a human rights framework needs to be reinforced. Although transitional justice doctrine recognizes the unique economic and security exigencies of the transitional 'moment', a new area of law that would potentially attenuate the principled and prudential demands of a human rights framework would be strongly resisted. In this regard, however, it is encouraging to see that some proponents of *jus post bellum* advocate an approach that recognizes the special challenges faced by post-conflict societies without permitting them to serve as justifications for inaction. For example, Stahn writes that

> 'a fair and just peace settlement will ideally endeavour to achieve a higher level of human rights protection, accountability and good governance than in the period before the resort to armed force'.[36]

If that were so, advocates of transitional justice would no doubt welcome the development of *jus post bellum*.

3.5 Jus post bellum's material and temporal scope of application

Concerning the field of application of *jus post bellum*, it seems apparent that a preceding conflict would be required in order to trigger the application of its body of rules and principles. However, many other details remain unclear, including whether *jus post bellum* standards would vary for national and non-international armed conflicts, whether thresholds for the required level of violence would be set, and whether *jus post bellum* would solely apply to occupation-type situations (in-

[35] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* n. 2, pp. 10 and 32. See also, e.g., Statute of the Special Court for Sierra Leone, Art. 10; *Prosecutor against Morris Kalon, Brima Bazzy Kamara*, Special Court for Sierra Leone, Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-04-15-PT-060, 13 March 2004, p. 88; *Chumbipuma Aguirre Et Al*. v. *Peru* (*Barrios Altos* case), Inter-American Court of Human Rights, Judgment of March 14 2001, Series C No. 75, p. 41.

[36] Stahn, *supra* n. 34, p. 957.

cluding UN administered territories). With regard to *jus post bellum*'s temporal scope, it is uncertain when *jus post bellum* would commence, bearing in mind that low-intensity conflict could continue in parts of a country for years after the signing of a peace agreement. It is also unclear when *jus post bellum* would cease to apply, bearing in mind that there is normally no natural or formal conclusion to any post-conflict period. That said, the resolution of these issues should not impact heavily on a government's choice to invoke or refrain from transitional justice measures in a *post bellum* context. As previously explained, the mechanisms of transitional justice can be applied at any time and in any context in which there is a legacy of mass abuse in need of policy attention. Moreover, dealing with the past is a long-term process and would not easily lend itself to fixed time-limits. Transitional justice's flexibility should and would, therefore, allow it to adjust to differing *jus post bellum* rules.

3.6 Carriers of jus post bellum obligations

A final point concerns the question of who would be the subjects of *jus post bellum* obligations. In the aftermath of an armed conflict, effective control may be exercised by different actors: a territory may have been occupied, unilaterally or multilaterally; it may have been placed under UN administration; a conflict may have ended without an ensuing occupation, thus leaving the local authorities in power; or, in the case of internal struggles for power, a rebellious faction may have ascended to power. Other scenarios, or combinations of those described, may also be imagined. Who would be the subjects of *jus post bellum* – all of these or only some? The literature to date appears unclear in this area, thus making it difficult to assess the implications for transitional justice. It may be noted, however, that in line with its emphasis on a human rights framework, transitional justice would tend to focus above all on local rather than international authorities. Assistance from internationals is welcomed, especially in the absence of domestic willingness or capacity, but the transitional process is preferably locally designed, owned, and implemented. Therefore, *jus post bellum* would likely have greater appeal and resonance *vis-à-vis* transitional justice if its principal subject was the state and not foreign governments or multilateral institutions, benevolent or otherwise.

4. Concluding Remarks

Transitional justice could comprise an important aspect of *jus post bellum*. However, unless and until the objectives and situational scope of *jus post bellum* are further refined and clarified, its relationship to transitional justice will remain somewhat inchoate.

As a more mature field of theory and practice, transitional justice has much to offer in the way of lessons learned and best practices for those who favour the emergence of a *jus post bellum.* These include important lessons about the relationship between truth, justice, reparation, and reform efforts, on the one hand, and the

pursuit of civic trust, national reconciliation, and sustainable peace, on the other. It is equally true, however, that transitional justice is insufficient in and of itself to ensure a successful peace-building process. If *jus post bellum* can help fill some of transitional justice's gaps and limitations, as well as those of traditional IHL and human rights law, it will have performed an invaluable service to the victims of conflict, whose right to restored dignity should remain at the centre of any humane doctrine for the rebuilding of a shattered society.

Part III
THE FUTURE OF JUS POST BELLUM

Chapter 12
THE FUTURE OF JUS POST BELLUM

Carsten Stahn

'*No Treaty of Peace Shall Be Held Valid in Which There Is Tacitly Reserved Matter for a Future War*'

Kant, Perpetual Peace, 1795

Does the concept of *jus post bellum* have a future? Most contributions in this volume appear to point in this direction. All of the essays differ in their individual treatment and analysis, but see some value in the basic theme and idea.

This cautious optimism finds some support in the history of the concept. Just war theory and political science have been ahead of international law and legal practice. The concept of *just post bellum* has formed part of the vocabulary just war theorists and scholars for centuries. Events such as peace-making experience in the Balkans, the occupation of Iraq, Abu Ghraib and violations of human rights by UN peace-keeping forces have brought it to the forefront of international law. Themes such as justice after war, state-building, post-war occupation and accountability of international organizations have gained prominent attention in contemporary scholarly writing. In thus context, the very notion of *jus post bellum* has made its entry into legal scholarship. The notion has been used as a concept to remedy gaps or flaws in the existing architecture of international law.

Although the concept of *jus post bellum* has gained renewed attention, there is still a strong divide within and across different disciplines concerning the meaning, use and scope of this concept. Four themes shall be explored at the end of this volume, which deserve further scrutiny in the future: (i) the relationship between law and morality, (ii) the notion and categorization of *jus post bellum*, (iii) the risks and benefits of the concept; and (iv) the scope of regulatory response.

1. The 'Moral' Versus the 'Legal'?

The first issue which merits greater clarification is the relationship between law and morality.

The contributions in this volume indicate that just war theory (e.g., Sharma, Orend) and legal scholarship (e.g., Neff, Garraway, Freeman and Djukić) on *jus post bellum* start from a common assumption: the lack of attention of the classical

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jus ad bellum and the *jus in bello* to the challenge of peace-making after conflict. Both disciplines appear to share a similar objective, namely the aim to remedy certain gaps and flaws in the conceptualization of warfare regarding peace-making.

However, in scholarship, both disciplines have usually been sharply distinguished. The 'moral' and the 'legal' dimensions of *jus post bellum* are hardly ever discussed from a comparative point of view. This strict separation of the 'moral' and the 'legal' has its reasons and justifications. Moral judgment is based on an inquiry into just cause, intent and means and ends of warfare. It is not necessarily desirable to rely on a strict application of the principle of distinction in this assessment. Similarly, it may be unhelpful to 'import' categories of moral judgment into the legal evaluation of armed force. One may even argue that the use of concepts such 'illegal, but legitimate' runs counter to the very purpose of the law since it may actually weaken the normative prohibition of the use of force or the constraints in warfare.

Nevertheless, the distinction is not always as clear-cut as it seems. There are certain helpful synergies. Just war theory builds in some cases on international law. Law is used by just war theorists to define limits under *jus ad bellum* and *jus in bello*. International law, in turn, relies in some cases on intention and cause (e.g., 'humanitarian intervention', 'pro-democratic intervention', 'intentional' targeting of civilians) in order assess the object and lawfulness of armed force. Both categories are thus interdependent.

This connection is also inherent in the concept of *jus post bellum*. The essays in this volume appear to suggest that law and morality may usefully complement each other. Legal parameters alone do not suffice to define conditions for fair and lasting peace. The law will often confine itself to state the negative, i.e., to define the limits to certain forms of actions. The definition of the scope of positive obligations and their moral justification will often depend on moral considerations. At the same time, it is misplaced to reduce the obligations of intervening powers to mere moral duties. International law contains a nucleus of principles on post-conflict peace, which determine the choices of peace-makers by force of law. As is rightly pointed out by Neff, the concepts of peremptory norms of international law and general principles of law provide a useful starting point concerning the assessment of peace arrangements. There are other examples. International law contains certain rules for the management of individual and collective responsibility (e.g., prohibition of collective guilt, accountability for aggression, proportionality of reparations) and institutional transformations (e.g., duties of the occupant, respect of self-determination). These principles form part of the existing law. They may serve as useful points of reference for the conception of *jus post bellum* under just war theory (Orend).

It is thus wrong to construe a 'moral' and a 'legal' *jus post bellum* in isolation from each other. There are important and justified differences between the two. But none of them is completely detached from the other. The contributions in this book appear to indicate that there is a need for more cross-disciplinary scholarship. Such research is needed to clarify both, the interdependencies and the boundaries of law and morality in this area.

2. Definition and Conception of Jus Post Bellum

The second problem which deserves closer scrutiny is the term *jus post bellum*. This notion is rooted in the just war tradition. It is used throughout this book by all contributors. However, it has its problems. One of its deficiencies is its imprecision. The notion is unsatisfactorily narrow and overly broad at the same time. Its link to inter-state warfare compromises its actual use in contemporary conflict. At the same time, the notion is so broadly used, that it means different things to different communities, sometimes even within the same discipline.

As it stands, *jus post bellum* is thus still more a metaphor than a fully-developed moral or legal concept. The notion extends moral and legal theory to systemic gaps which are left open by *jus ad bellum* and *jus in bello*. The term itself highlights the inherent connection to *jus ad bellum* and *jus in bello*.

However, the notion of *jus post bellum* cannot be understood in its literal sense in a modern setting. The notion must be tied to armed violence, rather than inter-state war, if it is meant to apply to contemporary uses of force, such as internal armed conflicts and enforcement operations. Moreover, the 'post' in this equation is a fragile concept. It appears to imply that (i) there is a swift and continuous transition from conflict to peace as well as (ii) a clear demarcation line between 'conflict societies' and 'post-conflict societies'.

Both assumptions are imperfect and somewhat artificial. Sometimes, there is no *continuum*. The suggested *ad bellum* (pre-conflict), *in bello* (armed hostilities) and '*post bellum'* sequence is interrupted in cases of relapse of violence or the transformation of the armed conflict from an international into an internal one. In such cases, the anticipated '*post bellum*' must coincide with *ad bellum* obligations. Moreover, there may not even be a proper '*post*' in the first place.

Rodin uses this argument to introduce a further distinction. He suggests that there are four categories that should form part of the equation: the classical '*ad bellum'*, the '*in bello*', a law of conflict termination (*terminatio* law), which specifies the conditions of transition from one stage to other, and the law after conflict in the proper sense (*jus post bellum*).

These nuances are not sufficiently captured by the traditional understanding of *jus post bellum*. The traditional notion is too narrow in its definition and its conception of *jus post bellum*. In just war theory, the notion was originally focused on the definition of general rights and duties of victorious states and post-war justice. This focus is obviously too restrictive in a contemporary setting. The scope of *just post bellum* must be extended beyond its traditional boundaries, such as the bipolar ('party-related') definition of duties and the link to warfare and its sequencing, if it is supposed to have any significant meaning.

Secondly, the very meaning of the concept needs to be adjusted to the structure contemporary legal order, in order to make sense. The contributions in this volume suggest that the revitalization of the notion of *jus post bellum* requires a systemic shift. *Jus post bellum* can no be longer be seen as a mere annex to *jus ad bellum* or *jus in bello*. It must be construed as an objective, and partly independent

framework for the articulation of rules of behavior regarding conflict termination and peace-making, including the process of transition itself.

3. Risks

A revival of the concept of *jus post bellum* is not without risk. The move from an *ad hoc* and peace meal driven approach to a systematic framework for peace-making creates novel antinomies. Some of the risks have been highlighted in this volume.

3.1 **Categorization**

The concept of *jus post bellum* overlaps with several existing categories of law. It is connected to *jus ad bellum* (Rodin). Moreover, it draws on rules and principles from existing branches of law, such as human rights law (Wilde) and transitional justice (Freeman and Djukić). The conception of an autonomous *jus post bellum* may bring greater clarity. It may also help avoid that gaps in the law are used by the 'powerful' to serve their interests (Garraway). However, creating a new category entails equally certain risks. A *jus post bellum* may override certain existing structures. It may further indulge a specifically 'conflict-related' vision of peace-making.

Some fear that an extension of the category of *jus post bellum may* blur the boundaries to human rights law and the law of peace. This claim is not unfounded. The extension of the existing categories to *jus post bellum* poses an obvious problem of temporal application. One of the challenges is to define for how long *jus post bellum* endures and when/where we draw the (legal) line between the end phase of conflict and something new.

Secondly, there is a broader systemic concern. It may be argued that a *post bellum* centred vision of law and violence limits the perspectives and visions of peace-making. It shifts the emphasis on the circumstances that prompted the violence. This vision (i.e., the design of a response to a particular legal situation primarily in terms of the conflict that preceded it) may limit the potential to grapple with the historical and systemic conditions that contributed to that situation over a longer term.

Both arguments suggest that the articulation of new legal category must be approached with some modesty. Creating more law is by no means a solution to the challenges of peace-building. The law can, at best, provide guidance for the choices of peace-makers. Moreover, *jus post bellum* cannot be considered as a self-sustained or a conclusive body of law, i.e., as a (vertical) *lex specialis* overriding all other applicable law. *Jus post bellum* is transitional by nature. One of its principal objectives is to organize of the interplay between different legal orders and bodies of law. This requires a multi-layered structure, which addresses the sequencing and simultaneous application of different bodies of law (including peacetime law or domestic law, if needed).

3.2 Means and methodologies

It is further evident that some of the approaches underlying contemporary peacebuilding require further revision in the context of the development of a *jus post bellum*.

This point has been made by a number of scholars in the second part of this volume. Pugh and Hansen and Wiharta have reminded us of the dilemmas of sovereignty and local ownership in processes of transition from conflict to peace. Tondini has drawn attention to accountability gaps in the contemporary legal order. Two factors appear to deserve particular attention in this context: the role of international actors, and the scope of legal reform.

Experience from cases such as Bosnia and Herzegovina, Kosovo, East Timor and Iraq has shown that engagement and problem-solving by international actors is in some cases not so removed from the 'noble cause' of enlightening people about civilization and preparing them for self-government. International practice has been dictated by an over-ambitious faith in the power of reform under international rule and a corresponding lack of attention to the accountability of international agents. There has been a strong discrepancy between internationalization and the preservation of local ownership and domestic choices. Pre-conceived 'package' solutions have been parachuted into domestic systems, without sufficient prospect for a corresponding 'internalization' of the underlying norms and values. International agents involved in state- or democracy building have typically viewed themselves as 'good Samaritans', whose failures ought to be attributed to the society they 'serve'.

Jus post bellum has to mitigate these risks, in order to achieve its objective, namely to restore or create just and sustainable peace. This requires a certain shift in perspective. *Jus post bellum* must partially serve as an instrument to encourage self-restraint or limit to the exercise of international authority. It should, in particular, identity means and methodologies to bring the institutional immunity and regulatory authority of international actors closer in line with the imperatives of (self-) government, consent and public legitimacy.

An additional challenge of *jus post bellum* is its potentially broad scope of addressees. *Jus post bellum* must accommodate the interests of numerous stakeholders (e.g., the soldier on the ground, the defeated power, the prevailing power, different local constituencies). This creates various normative dilemmas. In some case, it is unclear whose interests ought to be taken into account (e.g., 'which locals'). In other cases, it is necessary to decide how conflicting interests can be reconciled. For instance, military personnel would typically voice a preference for clear and manageable 'hard rules' that may be applied by the everyday soldier. Civilians and policy-makers may prefer 'soft' principles, which are flexible enough to accommodate local values, cultures and traditions.

Reconciling this spectrum of interests requires a sophisticated system of norms and sub-norms. A simple top-down methodology (e.g., a traditional hierarchy of norms) does not suffice. There must be further differentiation. The legal force of a norm may have to vary depending on the area at stake and the specific

addressee. A strict legal norm may, for instance, be required to deal with the legal regime of detention by peacekeepers, while flexible principles may be warranted with respect to the choice of forums for accountability and post-war justice.

4. The Scope of Regulation

To what extent is there a need and scope for regulation? This question continues to divide scholars. In his work 'Of War and Law' (Princeton University Press, 2006, p. 167) David Kennedy emphasized the point that legalization may itself be part of the problem. This view contrasts with Orend's call for the adoption of an additional Geneva Convention on *jus post bellum*.

The proper balance lies probably somewhere between these two views. Yes, it is time to overcome the conception that peace-making is simply an 'art'. The outcome of a peace agreement cannot be left entirely to the skills of negotiators involved in peace negotiations. Negotiations tend to be dictated by the bargaining power of the participants and '*do ut des'*. There are areas, in which there is simply no room for a 'deal'. Discretion and reliance on moral categories alone is not satisfactory.

However, a new Geneva Convention may not be sufficient to address the challenges of our time. The *jus in bello* is codified, yet, it is constantly violated. There is a need for a more complex and diversified approach.

It is important to note that there is already a significant amount of law. It is thus feasible to start with a thorough stocktaking of the law and an analysis of its shortcomings.

Secondly, it is crucial to identify what response is needed. Rules and norms may not be the primary target of action. For instance, institutional frameworks to foster dialogue and steer processes of transition may be more urgently required than new norms. There may also be a greater need for rules of conflict (e.g., rules and principles to identify priorities among competing interests) or 'soft law' principles (e.g., declaratory UN documents), rather than new substantive law. Finally, where an issue requires codification, less may well be more. A minimalist approach (e.g., a regulation of certain prohibitions) may be more effective than a comprehensive codification, since it leaves greater flexibility to take into account existing law and the specificities of the situation.

Last, but not least, any codification must be preceded by a sector-specific review of the needs and risks of regulation. A preliminary screening suggests that the following areas might deserve further consideration in this exercise:

(i) Treaty obligations (e.g., formation, conditions and limitations of peace settlements);
(ii) Institutional frameworks for the management of transition from conflict to peace (e.g., occupation; international territorial administration; partial institutional internationalization; caretaker governments);

(iii) Definition of the law applicable in transitions from conflict to peace (e.g., interplay between UN law, international humanitarian and human rights law; gaps in domestic law);
(iv) Management of individual responsibility (e.g., individual criminal responsibility; alternative forms of justice; settlement of property issues);
(v) Management of collective responsibility (e.g., scope and limits of state responsibility, reparation, compensation and frameworks for adjudication, such as arbitration, forums to adjudicate mass claims, etc);
(vi) Structural principles for institution-building (e.g., procedural and substantive implications of self-determination, democratic governance and domestic ownership; institutionalization of human rights protection, including return of refugees and displaced persons);
(vii) Parameters of economic reconstruction (e.g., management of development assistance; regulatory reform in the economic field; treatment of financial obligations, including succession into debts).

Contemporary approaches in some of these sectors may be traced back far in time. However, the time has come to revisit these assumptions in light of the table and contents of international law of the 21th century.